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IN THE
Supreme Court of the United States
OCTOBER TERM, 1994

AMERICAN BANKERS ASSOCIATION,
AMERICAN COLLEGE OF REAL ESTATE LAWYERS,
AMERICAN COUNCIL OF LIFE INSURANCE,
COMMERCIAL FINANCE ASSOCIATION,
EQUIPMENT LEASING ASSOCIATION OF AMERICA,

Petitioners,

v.

FRANK J. KELLEY, ATTORNEY GENERAL
OF THE STATE OF MICHIGAN, *ET AL.*,

Respondents.

On Petition For Writ Of Certiorari
To The United States Court of Appeals
For the District of Columbia Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

This case involves the validity of a rule issued by the EPA to define the scope of liability of secured creditors and provide them with a safe harbor under the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA or Superfund), 42 U.S.C. § 9601 *et seq.* The questions presented are:

1. Whether the court of appeals erred in striking down the EPA Rule, and erred in nullifying the rulemaking authority given to EPA by the CERCLA statute (42 U.S.C. §§ 9615, 9605, 9613), by ruling that EPA is powerless to issue rules affecting CERCLA "liability" issues (as opposed to "remedy" issues).

2. Whether the court of appeals erred in severely restricting the scope of *Chevron v. Natural Resources Defense Council*, 467 U.S. 837 (1984), based on an expansive reading of *Adams Fruit v. Barrett*, 494 U.S. 638 (1990).

RULE 29.1 LIST

The opinions of the court of appeals contain the names of all the parties.* See Kelley v. EPA, 15 F.3d 1100 (D.C. Cir. 1994) (App.A, *infra*, 1a- 25a), *on rehearing*, 25 F.3d 1088 (D.C. Cir. 1994) (App.B, *infra*, 26a- 35a).

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*/ To comply with Supreme Court Rule 29.1, petitioners state that each of them is a national nonprofit organization that has issued no publicly owned securities. Nor does any of the petitioners have any parent companies, or subsidiaries, or affiliates that have issued publicly owned securities.

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The American Bankers Association, the American College of Real Estate Lawyers, the American Council of Life Insurance, the Commercial Finance Association, and the Equipment Leasing Association of America petition for a writ of certiorari to the United States Court of Appeals for the District of Columbia Circuit in this case.

OPINIONS BELOW

The opinions of the court of appeals are reported at 15 F.3d 1100 and 25 F.3d 1088 (App.A and B, *infra*, 1a-35a).

JURISDICTION

The judgment of the court of appeals (App.C, *infra*, p. 36a) was entered on July 28, 1994. A timely petition for rehearing with a suggestion for rehearing *en banc* was denied on June 14, 1994 (App.D, *infra*, pp. 37a- 38a). On August 26, 1994 and September 8, 1994, the Chief Justice extended the time within which to file a petition for a writ of certiorari to and including October 27, 1994. The jurisdiction of this Court is invoked under 28 U.S.C. section 1254(1).

STATUTORY AND REGULATORY PROVISIONS INVOLVED

The Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. § 9601 *et seq.*, and the EPA Rule on "Lender Liability under CERCLA," 40 C.F.R. §300.1100, are set forth in relevant part in App.E, *infra*, 39a-51a.

STATEMENT

This case involves the validity of EPA's legislative rule defining the scope of liability of secured creditors under the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA or Superfund), 42 U.S.C. § 9601 *et seq.*

A. Statutory Background

Congress enacted the Superfund statute (CERCLA) because of widespread concern over the environmental and public health effects of improper disposal of hazardous substances. Under CERCLA, EPA has an array of administrative powers to address the release or threatened release of hazardous substances into the environment. The statute delegates to EPA[1] the comprehensive rulemaking powers in CERCLA § 115, which authorizes EPA "to promulgate any rules necessary to carry out the provisions of this subchapter." 42 U.S.C. § 9615. Similarly, in Section 105 of CERCLA, EPA is granted authority to promulgate National Contingency Plan (NCP) rules "to reflect and effectuate the responsibilities and powers created" by CERCLA. 42 U.S.C. § 9605(a). The statute states that, if an EPA rule is not attacked immediately by suit in the D.C. Circuit, it will bind private parties and cannot be attacked later by a private party or anyone else "[i]n any civil . . . proceeding . . . to obtain damages or recovery of response costs." 42 U.S.C. § 9613(a).

When the United States, a state or a private party incurs cleanup costs under CERCLA, such costs can be recovered from the classes of liable parties defined in section 107(a) of CERCLA. "Owners or operators" of hazardous substance facilities are one class of potentially liable persons.

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[1] The statute generally vests authority in the President in the first instance. The President, in turn, has delegated all of the CERCLA authority pertinent in this case to EPA. *See* Executive Order 12,850 (January 23, 1987) (delegation), 52 Fed. Reg. 2923-29; *Wagner Seed Co. v. Bush*, 946 F.2d 918, 920 (D.C. Cir. 1991), *cert. denied*, 112 S. Ct. 1584 (1992).

42 U.S.C. § 9607(a)(1) and (2). The statute narrows the term "owner or operator" by providing:

> Such term does not include a person who, without participating in the management of a vessel or facility, holds indicia of ownership primarily to protect his security interest in the vessel or facility.

42 U.S.C. § 9601(20)(A). This statutory language is referred to as CERCLA's "secured creditor exemption."

B. EPA's Lender Liability Rule

Over the years since CERCLA's enactment in 1980, commercial lenders experienced difficulty in steering clear of CERCLA liability and in deciphering what activities they could safely conduct under CERCLA's "secured creditor exemption," 42 U.S.C. § 9601(20)(A). As the court below put it (App.4a-5a):

> Conflicting judicial interpretations as to the scope of this secured creditor exemption opened the possibility that lenders would be held liable for the cost of cleaning up contaminated property that they hold merely as collateral. Lenders lacked clear guidance as to the extent to which they could involve themselves in the affairs of a facility without incurring liability and also as to whether they would forfeit the exemption by exercising their right of foreclosure, which could be thought to convert their "indicia of ownership"-- the security interest-- into actual ownership.

Lenders were threatened with liability for the full cost of cleanup at CERCLA sites, even though they were innocent of causing any contamination, under CERCLA's harsh regime of strict, joint and several liability. *See, e.g., United States v. Maryland Bank & Trust Co.*, 632 F. Supp. 573 (D.Md. 1986). One court suggested that a lender's mere capacity to affect hazardous waste disposal might void the "secured creditor exemption" and trigger CERCLA liability. *United States v. Fleet Factors*, 901 F.2d 1550, 1558 (11th Cir. 1990), *cert. denied*, 498 U.S. 1046 (1991).

To "fill in the gaps" and ambiguities that actual experience had revealed in CERCLA's "secured creditor exemption," EPA issued its Rule on "Lender Liability Under CERCLA." *See* 57 Fed. Reg. 18,344 at 18,358 (April 29, 1992). Clarifying the meaning of the statute according to its view of CERCLA's policies, EPA rejected the troublesome language in *Fleet Factors* and gave "bright line" tests to "specify the range of activities that may be undertaken" by secured lenders without incurring CERCLA liability. 56 Fed.Reg. 28,798 to 28,799 (June 13, 1991). EPA's Rule provides that: (1) Before foreclosure, a non-polluting lender is subject to CERCLA liability only if it actually exercises decisionmaking control over the borrower's environmental compliance, or over all or substantially all of the operational aspects of the enterprise, 40 C.F.R. § 300.1100(c)(1) (1992); and (2) after foreclosing, a non-polluting lender remains exempt from CERCLA liability so long as it takes steps to divest itself of the property in a prompt and commercially reasonable manner, 40 C.F.R. § 300.1100(d)(1) (1992). EPA intended that these regulations would bind all parties in CERCLA litigation, regardless of whether the United States was a party to the suit. 57 Fed.Reg. at 18,363 (April 29, 1992).

C. The Proceedings Below

1. The court of appeals, on petitions for review, struck down the EPA Rule. Two judges ruled that CERCLA did not invest the EPA with the statutory authority to issue substantive rules about lender liability, which might cut off the rights of private parties to sue and recover from lenders. *Kelley v. EPA*, 15 F.3d 1100 (D.C. Cir.1994) (App.1a-16a).

The structure of CERCLA, the majority found, limited EPA's rulemaking authority under 42 U.S.C. section 9615. Construing CERCLA section 106's provision for judicial review of EPA's case-by-case rulings on CERCLA reimbursement rights, the majority found implicit in the statute a sharp distinction between CERCLA "liability" and CERCLA "remedies." App.9a- 13a. The panel credited EPA with rulemaking authority only to define "the nature of actions parties must take in response to contamination-- not their ultimate liability for the contamination set forth in section 107 of CERCLA." App.9a.

This view was buttressed, the majority thought, by the right of private parties to test CERCLA liability questions directly in federal court "without any government involvement." App.12a. "Under these circumstances, it cannot be argued that Congress intended EPA, one of many potential plaintiffs, to have authority to, by regulation, define liability for a class of potential defendants." *Id.* Citing *Adams Fruit v. Barrett*, 494 U.S. 638 (1990), the panel concluded that "Congress, by providing for private rights of action under section 107, has designated the courts and not EPA as the adjudicator of the scope of CERCLA liability." App.13a. The court struck down the EPA rule and vacated it, finding no basis for it as either a "substantive" or "interpretative" rule. App.14a-16a.

Chief Judge Mikva dissented, on the ground that EPA's Rule should be accorded *Chevron* deference. App.17a-25a. CERCLA's provisions for court review of EPA adjudications of CERCLA section 106 reimbursement rights, he found, merely preserve traditional burdens of proof for issues of causation. App.20a-24a. With respect to *Adams Fruit*, Chief Judge Mikva found private rights of action relevant only where an agency purports to interpret a statutory provision that it does not administer "in any respect." That situation was not presented here, because EPA often construes the scope of CERCLA "owner or operator" liability (as well as CERCLA's "secured creditor exemption") in the course of its day-to-day administration of the statute. App.24a-25a.

2. The court of appeals denied rehearing, again by a 2 to 1 vote. *Kelley v. EPA*, 25 F.3d 1088 (D.C. Cir. 1994) (App. 26a-35a). Overruling the objections of EPA and petitioners (who were intervenors below), the majority stated that EPA's Rule was not entitled to *Chevron* deference, because the CERCLA statute treats EPA "only as a prosecutor without specific authority to issue regulations bearing on the questions prosecuted." App.34a. Chief Judge Mikva again dissented.[2]

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[2] CERCLA reauthorization bills before the Congress would have overruled the court of appeals' decision. *See* H.R. 3800, 103d Cong. 2d Sess. p.61 (1994); H.R. 4916, 103d Cong. 2d Sess. pp.98-99 (1994); S.1834, 103d Cong., 2d Sess. pp.72-73 (1994); H.R. Rep. 103-582, pt 2 at pp.25, 100 (1994). Those bills recently died, notwithstanding broad-based support for Superfund reform. *See* "Superfund Reform Bites the Dust," Washington Post p.A15 (Thursday, October 6, 1994).

REASONS FOR GRANTING THE WRIT

This case raises issues of exceptional importance for the financial community of the United States, for EPA's basic power to issue rules under CERCLA, and for federal agency rulemaking power and court review of agency rules under *Chevron v. Natural Resources Defense Council*, 467 U.S. 837 (1984).

Without the EPA Rule, the court of appeals majority acknowledged, secured lenders "face potentially staggering liability because of the generality of the [CERCLA] statutory language and the prospect of private suits" seeking to impose CERCLA liability on lenders who are innocent of causing contamination. *Kelley v. EPA*, 15 F.3d 1100, 1109 (D.C. Cir. 1994) (App.15a). The impact is immediate, severe and adverse on many financial transactions throughout the country.

The court of appeals' decision also hamstrings EPA's rulemaking authority under CERCLA by holding that EPA is powerless to issue rules clarifying any CERCLA issue that affects CERCLA "liability" (as opposed to "remedy"). Viewing CERCLA as a statute under which only the courts (not administering agencies) are empowered to define "liability," the court of appeals majority nullified CERCLA's explicit statutory grant of rulemaking authority to EPA (42 U.S.C. § 9615), swept aside the CERCLA statutory provision that valid EPA rules are binding in private party litigation (42 U.S.C. § 9613), and then manufactured its "liability" vs. "remedy" distinction and engrafted it onto the clear words of the CERCLA statute granting EPA wide rulemaking authority. This strained ruling-- overreading *Adams Fruit v. Barrett*, 494 U.S. 638 (1990), to nullify agency rulemaking power on "liability" issues in a dual

government/private party enforcement scheme-- graphically illustrates the need for this Court to clarify the standards of *Chevron* and the relationship between *Chevron* and *Adams Fruit*. *See* 1 Davis & Pierce, *Administrative Law Treatise* § 3.5-§3.6 (3d ed. 1994); Merrill, *Judicial Deference to Executive Precedent*, 101 Yale L.J. 969 (1992).

I. THE VALIDITY OF EPA'S LENDER LIABILITY RULE, AND THE SCOPE OF EPA'S ADMINISTRATIVE POWER UNDER CERCLA, ARE ISSUES OF NATIONAL IMPORTANCE THAT SHOULD BE RESOLVED BY THIS COURT.

A. The validity of the EPA Rule presents an issue of national importance that should be resolved by this Court. Without the clear "bright line" tests in the EPA Rule, the earlier confusion in the law (which prompted EPA to act in the first place) remains. *See* App.15a. The threat of catastrophic CERCLA liability continues to deter secured lenders from making beneficial loans, it distorts prudent lending practices upon borrower default, and it chills sound environmentally protective activities.

The importance of clear, predictable "safe harbor" protections from CERCLA liability was stressed repeatedly by lenders during EPA's rulemaking proceedings. Many areas in the country contain hazardous substances. Without the protection of the EPA Rule, lenders often refuse to make loans to some types of borrowers and businesses, as well as loans secured by some types of properties.[3] They generally

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[3] According to a 1990 poll by the American Bankers Association, canvassing banks with assets of $250 million or less, "43 percent of respondents have already stopped

avoid commercial real estate lending at all absent expensive environmental inspections and testing. Moreover, when borrowers default, lenders often abandon collateral rather than risk incurring cleanup liability as a CERCLA "owner" or "operator" by foreclosing.[4] Without the EPA Rule, lenders will continue to cut back on lending to small businesses, where the cost of an environmental inspection often outweighs the value of the loan itself. These marketplace reactions create a "credit crunch" for some small businesses and other industries, take properties out of private circulation, and increase the number of "orphan" sites that remain unremediated because no financing is available.

Testimony before Congress by lenders explained their concerns with *Fleet Factors*. The very act of making a loan enables a lender to influence a borrower's handling of hazardous substances. In light of the uncertain court cases, a lender can best avoid liability by not making loans, especially to borrowers in higher risk businesses and locations; not foreclosing on a defaulted loan; not attempting to salvage a loan in default; not having loan covenants that

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making loans altogether to certain types of small businesses, those that [are] most frequently associated with environmental problems, and another 11 percent plan to do so shortly." *Hearings before Senate Banking Committee on S.2827* Tr.65-66 (July 19, 1990) (statement of Charles M. Mitschow).

[4] *See* surveys of effect of CERCLA on banking and lending activities, Joint Brief of Intervenors in *Kelley v. EPA*, Appendix I (D.C.Cir. Nos.92-1312, 92-1314) (Aug.1993), and in INDEPENDENT BANKER 28 (Nov. 1991).

require the borrower to handle hazardous substances responsibly; and certainly not enforcing such covenants. While enabling a lender to avoid liability, such practices are imprudent: They impose unnecessary losses on the financial community, raise the cost of credit and preclude lenders from engaging in environmentally protective activities. *Hearing Before the Subcommittee on Policy Research and Insurance of the House Comm. on Banking, Finance and Urban Affairs*, 102d Cong., 1st Sess. 388, 396-397 (1991) (statement of spokesmen for American Bar Association Section of Real Property, Probate and Trust Law).

The old *Fleet Factors* decision has continued viability in the Eleventh Circuit, spawning fear there and elsewhere about the status of secured creditors. Other courts of appeals (without regard to the EPA Rule) take a different view of CERCLA's statutory "secured creditor exemption." *See, e.g., Waterville Industries v. Finance Auth. of Maine*, 984 F.2d 549, 553 (1st Cir. 1993). We believe that the statute, properly construed, should broadly protect ordinary lending practices. But without the EPA Rule, it will require many years for the various federal appellate courts to rule on the issue, and even when they do so, they may never provide the clear, uniform "bright line" guidance of the EPA Rule.

This Court should reinstate the EPA Rule to ensure that CERCLA's "secured creditor exemption" is given a clear and uniform meaning in different jurisdictions across the Nation.

B. EPA's rulemaking authority under CERCLA is seriously eroded by the court of appeals' erroneous ruling. Under the lower court's theory, EPA is powerless to issue rules clarifying any issue that affects CERCLA "liability." No court has ever hamstrung an agency in this fashion when

it has been charged with overall responsibility to enforce the law.

The structure and language of CERCLA are at war with the court of appeals' decision striking down the EPA Rule. The broad agency rulemaking authority conferred by 42 U.S.C. section 9615 is not limited by the statutory language to selection of a proper "remedy" as opposed to CERCLA "liability" issues. Instead, the majority read that limitation into the "structure" of CERCLA based on an expansive reading of *Adams Fruit v. Barrett*, 494 U.S. 638 (1990).[5] But unlike the situation in *Adams Fruit*, there is no jurisdictional barrier to EPA interpreting CERCLA "liability" issues. EPA must interpret CERCLA's §107 liability sections every day, as part of its enforcement responsibilities. *See* App.25a. It clearly has jurisdiction to do so.

The court of appeals reasoned that CERCLA leaves private parties free to test CERCLA liability issues directly in court "independent of EPA's institutional view" (App.15a). But CERCLA's provisions for judicial review, in 42 U.S.C. section 9613(a), show that private party CERCLA litigation must be conducted within the limits set by EPA rules. The statute states that if an EPA rule is not attacked

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[5] This Court in *Adams Fruit* considered a federal agency regulation interpreting a private statutory right of action for migrant farm workers injured by an employer's failure to comply with the law. But the agency had no role whatsoever in enforcing this statutory section. The Court held that Congress made the judiciary the sole adjudicator of these private rights of action. 494 U.S. at 649. The federal agency had simply attempted to "bootstrap itself into an area in which it has no jurisdiction." Id. at 650.

immediately by suit in the D.C. Circuit, it is binding on private parties and cannot be attacked later by a private party or anyone else "in any civil . . . proceeding . . . to obtain damages or recovery of response costs." 42 U.S.C. § 9613(a). The statute clearly contemplates-- contrary to the court of appeals' ruling-- that EPA rules will have binding effect in private party litigation on CERCLA liability issues.

II. THE OVERBROAD INTERPRETATION OF *ADAMS FRUIT V. BARRETT*, 494 U.S. 638 (1994), BY THE COURT OF APPEALS, SERIOUSLY UNDERMINES *CHEVRON*.

The overbroad reading of *Adams Fruit*, by the court below, raises an important and recurring question about the scope of this Court's decision in *Chevron v. Natural Resources Defense Council*, 467 U.S. 837 (1984). The lower court's ruling was recently relied upon by the Eighth Circuit to create an explicit conflict in the circuits about the proper relationship between *Adams Fruit* and *Chevron*. *Compare Dico v. Diamond*, ___ F.3d ___ (8th Cir. Sept.12, 1994) *with Wagner Seed Co. v. Bush*, 946 F.2d 918 (D.C. Cir. 1991), *cert. denied*, 112 S. Ct. 1584 (1992). The origin of the conflict is the decision below, which should be reviewed by this Court to clarify the scope and meaning of *Chevron*.

A. *Adams Fruit* and *Chevron*. When issued, *Adams Fruit v. Barrett*, 494 U.S. 638 (1990), seemed to represent a very narrow exception to *Chevron* and its basic rule of judicial deference to agency rulemaking under a broad statutory grant of authority: Agencies cannot validly issue rules interpreting statutory provisions that they lack jurisdiction to address at all. *Cf. Office of Professional Employees Int'l v. FDIC*, 962 F.2d 63, 65 (D.C. Cir. 1992) (R. B.

Ginsburg, J.).[6] The court below extrapolated *Adams Fruit* far beyond this, to suggest that *Chevron* deference disappears whenever an agency issues a rule in the context of a dual government/private enforcement scheme. The sweeping implications of this erroneous ruling are startling.

Were the lower court's reasoning to stand, it would threaten EPA's rulemaking authority not only for CERCLA but for all environmental statutes, which commonly provide both for "citizen suits" or other private rights of action, and for comprehensive EPA legislative rulemaking authority.[7] Moreover, there are numerous statutory schemes in which a federal agency's administration and enforcement of a statute is supplemented with private rights of action, but these agencies nonetheless have been accorded *Chevron* deference

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[6] The commentators similarly view *Adams Fruit* as a narrow exception to *Chevron*. *See* Dyk & Schenck, *Exceptions to Chevron*, 18 Admin.Law News 12, 13 (Winter 1993); Merrill, *Judicial Deference*, 101 Yale L.J. 969, 987 (1992).

[7] *See, e.g.*, Clean Water Act, 33 U.S.C. § 1361 (EPA rulemaking), § 1365 (citizen suit); Marine Protection Research and Sanctuaries Act, 33 U.S.C. § 1415(g) (citizen suit), § 1418 (EPA rulemaking); Safe Drinking Water Act, 42 U.S.C. § 300j-8 (citizen suit), § 300j-9(a) (EPA rulemaking); Noise Control Act, 42 U.S.C. § 4905b (EPA rulemaking), § 4911 (citizen suit); Resource Conservation and Recovery Act, 42 U.S.C. § 6912(a)(1) (EPA rulemaking), § 6972 (citizen suit); Clean Air Act, 42 U.S.C. § 7601(a) (EPA rulemaking), § 7604 (citizen suit); Emergency Planning and Community Right-to-Know Act, 42 U.S.C. § 11046 (citizen/government suits), § 11048 (EPA rulemaking).

in their interpretations of statutory terms giving rise to liability.[8]

The straightforward principle of administrative law that should control here is that "Congress created the private right of action to facilitate enforcement of CERCLA's statutory scheme within the parameters of lender liability which the EPA, as the administering agency, would define." App.24a (Mikva, C.J., dissenting). *See* 42 U.S.C. § 9613(a) (EPA rules are binding in later private party CERCLA litigation).

B. Text and Structure of the CERCLA Statute.

The court below misconstrued the language and structure of CERCLA to reflect its overreading of *Adams Fruit*.

1. **Text.** The court of appeals nullified CERCLA's

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[8] *See, e.g., Cook v. State of Rhode Island Department of Mental Health, Retardation and Hospitals*, 10 F.2d 17, 22 (1st Cir. 1993) (under parallel enforcement scheme, great weight accorded EEOC regulations defining what constitutes "perceived disability" for purposes of claim under the Rehabilitation Act); *NAACP v. American Family Mut. Ins. Co.*, 978 F.2d 287, 300 (7th Cir. 1992) (court accords *Chevron* deference to agency's interpretation of Fair Housing Act, where Act contained "a provision for administrative enforcement paralleling judicial enforcement" by private parties); *Leonard v. United Air Lines*, 972 F.2d 155, 158 (7th Cir. 1992) (deference to agency interpretation of Veterans Act); *Polaroid Corp. v. Disney*, 862 F.2d 987, 994-95 (3d Cir. 1988) (deference to SEC interpretation of the Securities and Exchange Act).

general statutory grant of rulemaking authority to the President (and his delegate, EPA)

> to promulgate any regulations necessary to carry out the provisions of this subchapter [42 U.S.C. § 9615]

The court below seems to require that a statutory delegation of agency rulemaking authority must specifically mention "liability," before the agency will be deemed to have rulemaking authority on "liability" issues. But this conflicts with this Court's decisions, which construe general statutory grants of rulemaking authority broadly, to give wide scope to agency legislative rulemaking. *See, e.g., Mourning v. Family Publications Service, Inc.*, 411 U.S. 356, 369-370 (1973).

2. **Statutory Structure: EPA's Role as "Prosecutor."** The opinions below repeatedly discount EPA's Rule on the ground that EPA is a CERCLA "prosecutor." *See, e.g.*, App.10a; App.34a. But this ignores the specific CERCLA statutory provisions giving EPA legislative rulemaking authority. 42 U.S.C. § 9615, § 9605. Nearly all cases in which an agency's views are entitled to *Chevron* deference involve statutes allowing the agency to act, in some situations, as a "prosecutor." *See, e.g., Martin v. OSHRC*, 499 U.S. 144, 157 (1991).

Where an agency issues a legislative rule, it is drawing on agency policy views about the statute in a way that is unlikely to be "biased."[9] In these circumstances,

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[9] One of the important differences between an agency "prosecution" (on the one hand) and an agency legislative rule like the EPA Rule here (on the other hand) is that the

Chevron deference is appropriate notwithstanding the fact that the agency also might have authority to act as a civil "prosecutor" in other cases under the same statute. *See, e.g., Martin v. OSHRC*, 499 U.S. 144, 157 (1991). This Court should clarify the law here, to reaffirm the validity of agency rulemaking power under broad statutory grants of authority, where the agency also sometimes acts as a civil "prosecutor."

The overbroad reading of *Adams Fruit* by the court of appeals below squarely presents an important and recurring question about the proper relationship between *Adams Fruit* and *Chevron*. The profound importance of the EPA Rule to commercial lending practices that are vital to the Nation's economy, and to our Nation's continuing efforts to clean up hazardous wastes, makes review by this Court imperative.

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risk of "prosecutorial" bias or agency self-interest is *less* for a true legislative rule that is applicable across-the-board to many different cases including cases in which the agency itself is not a party. *Contrast Meadow Green-Wildcat v. Hathaway*, 936 F.2d 601, 604-605 (1st Cir. 1991) (Breyer, J.) (court denies *Chevron* deference to agency interpretation of contract to which it was a party and permits that have the same effect).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

EDITOR'S NOTE

THE FOLLOWING PAGES WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

APPENDIX A

Notice: This opinion is subject to formal revision before publication in the Federal Reporter or U.S.App.D.C. Reports. Users are requested to notify the Clerk of any formal errors in order that corrections may be made before the bound volumes go to press.

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

Argued October 28, 1993 Decided February 4, 1994

No. 92-1312

FRANK J. KELLEY, ATTORNEY GENERAL OF THE STATE OF MICHIGAN,
FRANK J. KELLEY, EX REL STATE OF MICHIGAN,
MICHIGAN DEPARTMENT OF NATURAL RESOURCES,
FRANK J. KELLEY,
PETITIONERS

v.

ENVIRONMENTAL PROTECTION AGENCY,
WILLIAM K. REILLY, ADMINISTRATOR,
RESPONDENTS

AMERICAN BANKERS ASSOCIATION,
EQUIPMENT LEASING ASSOCIATION OF AMERICA,
COMMERCIAL FINANCE ASSOCIATION,
AMERICAN COUNCIL OF LIFE INSURANCE,
AMERICAN COLLEGE OF REAL ESTATE LAWYERS,
INTERVENORS

Bills of costs must be filed within 14 days after entry of judgment. The court looks with disfavor upon motions to file bills of costs out of time.

No. 92-1314

CHEMICAL MANUFACTURERS ASSOCIATION,
PETITIONER

v.

ENVIRONMENTAL PROTECTION AGENCY,
RESPONDENT

AMERICAN BANKERS ASSOCIATION,
EQUIPMENT LEASING ASSOCIATION OF AMERICA,
COMMERCIAL FINANCE ASSOCIATION,
AMERICAN COUNCIL OF LIFE INSURANCE,
AMERICAN COLLEGE OF REAL ESTATE LAWYERS,
INTERVENORS

Petition for Review of Orders of the
Environmental Protection Agency

Jeremy M. Firestone, Assistant Attorney General, State of Michigan, argued the cause for petitioners Michigan Attorney General Frank J. Kelley, the State of Michigan and the Michigan Department of Natural Resources in No. 92-1312. With him on the briefs was *Thomas L. Casey*, Solicitor General, State of Michigan.

Theodore L. Garrett argued the cause for petitioner Chemical Manufacturers Association in No. 92-1314. With him on the briefs were *David F. Zoll* and *Dell E. Perelman*.

Bradley M. Campbell, Attorney, United States Department of Justice, argued the cause for respondents. With him on the brief was *Earl C. Salo*, Counsel, United States Environmental Protection Agency. *Michael A. McCord*, Attorney, United States Department of Justice, entered an appearance for respondents.

On the joint brief for intervenors American Bankers Association, et al., and *amicus curiae* Mortgage Bankers Association of America were *John J. Gill, Thomas J. Greco, Michael F. Crotty, Roger D. Schwenke, Margaret V. Hathaway, Howard L. Feinstein, Robert S. McConnaughey, Samuel I. Gutter, David T. Buente, Jr., Edwin E. Huddleson, III,* and *William E. Cumberland. Richard R. Goldberg* entered an appearance for intervenor American College of Real Estate Lawyers in Nos. 92-1312 and 92-1314.

Before: MIKVA, *Chief Judge,* SILBERMAN and HENDERSON, *Circuit Judges.*

Opinion for the Court filed by *Circuit Judge* SILBERMAN.

Dissenting opinion filed by *Chief Judge* MIKVA.*

SILBERMAN, *Circuit Judge:* Petitioners challenge an EPA regulation limiting lender liability under CERCLA. We hold that EPA lacks statutory authority to restrict by regulation private rights of action arising under the statute and therefore grant the petition for review.

I.

Congress enacted the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA), 42 U.S.C. § 9601 *et seq.*, in 1980 to "provide for liability, compensation, cleanup, and emergency response for hazardous substances released into the environment and the cleanup of inactive hazardous waste disposal sites." Pub. L. No. 96-510, 94 Stat. 2767 (1980). The statute provides several mechanisms to further these objectives. Section 105 requires the President to promulgate and publish a National Contingency Plan (NCP) to direct actions in response to a hazardous contamination and to prescribe the procedures for those actions. 42 U.S.C. § 9605 (1988). The President in turn has delegated primary authority under section 105—and much of CERCLA—to EPA. *See* Exec. Order No. 12,580 § 1(b)(1), *reprinted in* 42 U.S.C.A. § 9615 app. at 291-95 (1993 West Supp.). Under section 104, 42 U.S.C. § 9604(a)(1), the President (again, EPA by delegation, *see* Exec. Order No. 12,580 § 2(g)) may undertake direct remedial actions—either by

* Chief Judge Mikva's dissent will be published separately.

employing agency personnel or through private contracting—to clean up a contaminated site and may fund the cost of such actions through the Hazardous Waste Superfund, 26 U.S.C. § 9507 (1988). The government may then bring cost recovery actions under section 107 of CERCLA against responsible parties to replenish the funds expended. 42 U.S.C. § 9607(a)(4)(A).

Alternatively, where "there may be an imminent and substantial endangerment to the public health or welfare or the environment," EPA may order parties to clean up the hazardous waste and remedy its effects. 42 U.S.C. § 9606(a); Exec. Order No. 12,580 § 4(d)(1). Those who receive and comply with such orders are entitled to reimbursement of their reasonable costs if they are not liable under section 107, 42 U.S.C. § 9607(a), or—even if liable—if they establish on the administrative record that the cleanup action ordered was arbitrary and capricious or otherwise unlawful. 42 U.S.C. § 9606(b)(2)(C)-(D). EPA also may assess civil penalties for noncompliance with certain CERCLA provisions and bring an action in federal district court to collect such penalties. 42 U.S.C. § 9609; Exec. Order No. 12,580 § 4(d)(2).

CERCLA also authorizes private parties and EPA to bring civil actions independently to recover their costs associated with the cleanup of hazardous wastes from those responsible for the contamination. 42 U.S.C. § 9607(a). Section 107 of CERCLA generally imposes strict liability on, among others, all prior and present "owners and operators" of hazardous waste sites. *Id.* § 9607(a)(1). Congress created a safe harbor provision for secured creditors, however, in the definition of "owner or operator," providing that "[s]uch term does not include a person, who, without participating in the management of a vessel or facility, holds indicia of ownership primarily to protect his security interest in the vessel or facility." 42 U.S.C. § 9601(20)(A).

Conflicting judicial interpretations as to the scope of this secured creditor exemption opened the possibility that lenders would be held liable for the cost of cleaning up contaminated property that they hold merely as collateral. Lenders

lacked clear guidance as to the extent to which they could involve themselves in the affairs of a facility without incurring liability and also as to whether they would forfeit the exemption by exercising their right of foreclosure, which could be thought to convert their "indicia of ownership"—the security interest—into actual ownership. *See United States v. Maryland Bank & Trust Co.*, 632 F. Supp. 573, 578–80 (D. Md. 1986). In *United States v. Fleet Factors Corp.*, 901 F.2d 1550 (11th Cir. 1990), *cert. denied*, 498 U.S. 1046 (1991), the court, although adhering to the settled view that Congress intended to protect the commercial practices of secured creditors "in their normal course of business," *id.* at 1556, nevertheless stated that "a secured creditor will be liable if its involvement with the management of the facility is *sufficiently broad* to support the inference that it could affect hazardous waste disposal decisions if it so chose." *Id.* at 1558 (emphasis added).

This language, portending as it did an expansion in the scope of secured creditor liability, caused considerable discomfort in financial circles. Intervenor American Bankers Association points to survey data indicating that lenders curtailed loans made to certain classes of borrowers or secured by some types of properties in order to avoid the virtually unlimited liability risk associated with collateral property that may be contaminated. Some lenders, we are told, even chose to abandon collateral properties rather than foreclosing on them for fear of post-foreclosure liability.

EPA, responding to the understandable clamor from the banking community and in light of the federal government's increasing role as a secured creditor after taking over failed savings and loans,[1] instituted a rulemaking proceeding, 56

[1] Federal bank regulatory agencies might themselves be considered "owners and operators" of collateral property held by failed thrifts after their appointment as receivers or conservators of the thrifts, *see* 12 U.S.C. § 1821(d)(2)(A)-(B), thus leading to EPA's concern that the federal government may be potentially liable. *See* 56 Fed. Reg. 28,798, 28,799 (1991); 57 Fed. Reg. 18,344, 18,345 (1992).

Fed. Reg. 28,798 (1991), to define the secured creditor exemption when legislative efforts to amend CERCLA failed. *See, e.g.*, H.R. 4494, 101st Cong., 2d Sess. (1990), 136 Cong. Rec. H1505 (daily ed. Apr. 4, 1990). In April 1992, EPA issued the final regulation, which employs a framework of specific tests to provide clearer articulation of a lender's scope of liability under CERCLA. The rule provides an overall standard for judging when a lender's "[p]articipation in [m]anagement" causes the lender to forfeit its exemption. 40 C.F.R. § 300.1100(c)(1) (1992). A lender may, without incurring liability, undertake investigatory actions before the creation of a security interest, monitor or inspect the facility, and require that the borrower comply with all environmental standards. 40 C.F.R. § 300.1100(c)(2). When a loan nears default, the rule permits the lender to engage in work-out negotiations and activities, including ensuring that the collateral facility does not violate environmental laws. 40 C.F.R. § 300.1100(c)(2)(ii)(B). The rule also protects a secured creditor that acquires full title to the collateral property through foreclosure, as long as the creditor did not participate in the facility's management prior to foreclosure and undertakes certain diligent efforts to divest itself of the property. 40 C.F.R. § 300.1100(d). Lenders still face liability under section 107(a)(3) and (4)—as opposed to liability as an "owner and operator" under section 107(a)(1) and (2)—if they arrange for the disposal of hazardous substances at a facility or accept hazardous waste for transportation and disposal. 40 C.F.R. § 300.1100(d)(3).

In response to comments questioning whether the rule would apply in actions where the United States was not a party, EPA stated that the regulation is "a 'legislative' or 'substantive' rule that has undergone notice-and-comment pursuant to the Administrative Procedure Act" and as such "defines the liability of holders [of security interests] for CERCLA response costs in both the United States' and private party litigation." 57 Fed. Reg. 18,344, 18,368 (1992). The agency alternatively asserted that even if the rule were read as "a 'mere' interpretation of section 101(20)(A)," it would affect third-party litigation since "EPA guidance and

interpretations of laws administered by the Agency are given substantial deference by the courts." *Id.* (citations omitted).

Michigan and the Chemical Manufacturers Association filed petitions for review of the final regulation under section 113(a) of CERCLA, 42 U.S.C. § 9613(a), which gives us exclusive jurisdiction to review any regulation promulgated under the statute. Petitioners are interested in the EPA rule because, as potential litigants under section 107, they do not want to be foreclosed from suing lenders. Petitioners argue that EPA lacks statutory authority to define, through its regulation, the scope of lender liability under section 107—an issue that they assert only federal courts may adjudicate. They also urge that the substance of the regulation contradicts the plain meaning of certain statutory language.

II.

Although petitioners bring a general challenge to the authority of EPA to promulgate *any* substantive regulations under CERCLA, that issue is settled. We held in *Wagner Seed Co., Inc. v. Bush*, 946 F.2d 918, 920 (D.C. Cir. 1991), *cert. denied*, 112 S. Ct. 1584 (1992), that the President had broadly delegated his statutory powers to EPA, and it is "the administering agency" for the statute. However, we had previously recognized that with respect to any specific regulation, EPA must demonstrate "either explicit or implicit evidence of congressional intent to delegate interpretive authority." *Linemaster Switch Corp. v. EPA*, 938 F.2d 1299, 1303 (D.C. Cir. 1991). EPA, for its part, contends that *Wagner Seed* went further and recognized EPA's general authority under section 115 of CERCLA[2] to promulgate rules that a typical administrative agency would issue, rules that are "reasonably related to the purposes of the enabling legisla-

[2] That section states:

> The President is authorized to delegate and assign any duties or powers imposed upon or assigned to him and to promulgate any regulations necessary to carry out the provisions of this subchapter.

42 U.S.C. § 9615.

tion." *Mourning v. Family Publications Serv., Inc.*, 411 U.S. 356, 369 (1973) (quotations omitted).

The government overreads *Wagner Seed*. We held there that EPA had authority to interpret *certain* language in section 106 of CERCLA that applied to EPA's administrative responsibilities. We rejected petitioners' argument, which found some support in a strong dissent, that the *entire* section 106 referring to liability questions must be interpreted in court, and that EPA therefore had no authority to define that section. To permit EPA to do so, petitioners had contended, would be inconsistent with the Supreme Court's decision in *Adams Fruit Co. v. Barrett*, 494 U.S. 638 (1990), holding that an agency may not issue regulations covering "'an area in which it has no jurisdiction.'" *Id.* at 650 (citations omitted). We emphasized, however, that the language EPA interpreted did *not* bear directly on liability issues and, indeed, suggested that since Congress provided for *de novo* judicial review of the agency's "particularized decision respecting liability," deference as to those issues would be inappropriate. *Wagner Seed*, 946 F.2d at 922. Had EPA attempted to define the manner in which a party sought judicial redress, "the rationale of *Adams Fruit* would seem to apply." *Id.* at 923. Here we encounter an issue not squarely decided in *Wagner Seed*—whether the EPA can, by regulation, define and limit a party's liability under section 107. But the reasoning of *Wagner Seed*, or at least its dicta, cuts against the government.

EPA looks to several different portions of CERCLA to find the specific authority we have required. The agency points to section 105 of CERCLA, which provides that the agency has responsibility to promulgate the national contingency plan setting forth the actions and procedures to be taken in response to a contamination. It is argued that the broad language of section 105, authorizing EPA "to reflect and effectuate the responsibilities and powers created by this chapter," 42 U.S.C. § 9605(a); Exec. Order No. 12,580 § 1(b)(1), gives it power to define section 107 liability—which the agency characterizes as a "responsibility and power" under the chapter. Although the mandate of section 105 does

"provide[ ] the EPA with broad rulemaking authority to craft the NCP," *Ohio v. EPA*, 838 F.2d 1325, 1331 (D.C. Cir. 1988), it is hardly a specific delegation of authority to EPA to interpret section 107. We must still determine whether defining the scope of liability is among the "responsibilities and powers" Congress delegated to EPA under CERCLA.[3]

EPA points to specific provisions of that section, paragraphs 105(a)(4) and 105(a)(3). The former authorizes the agency to prescribe "appropriate *roles* and responsibilities ... of nongovernmental entities in effectuating the plan." 42 U.S.C. § 9605(a)(4) (emphasis added). EPA claims that the lender liability rule accomplishes just that by defining the "role" of security creditors. That is an imaginative use of the word role, but EPA's argument is hardly persuasive since section 105 refers to the nature of actions parties must take in response to contamination—not their ultimate liability for the contamination set forth in section 107. If EPA's position were correct, Congress would have had no need to provide for a party's liability in section 107; EPA would have been authorized to develop those standards under section 105. For similar reasons, paragraph 105(a)(3) does not help EPA. That provision obliges the agency to issue "methods and criteria for determining the appropriate extent of removal, remedy, and other measures authorized by [CERCLA]," but it does not speak to liability. As discussed below, a party might be obliged to provide a remedy and be entitled to reimbursement when determined subsequently not to be liable.

EPA also relies on those statutory provisions which grant it authority to seek enforcement. The agency may choose to

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[3] Section 107 does implicate EPA's role in promulgating the NCP under section 105 because response costs are recoverable only to the extent that they are "consistent with the national contingency plan," 42 U.S.C. § 9607(a)(4)(B). That provision, however, speaks not to the question of liability but instead to the remedy against a party already deemed to be liable. EPA's role in defining the parameters of the NCP, therefore, does not translate to authority to determine liability under section 107, but rather to limit the level of damages recoverable by the prevailing party.

contract to clean up a contaminated site (financed through the Superfund), and then bring action in federal court under section 107(a)(4)(A) to recover its costs from a liable party. It is argued that the agency must first decide whether a party is actually liable before bringing such an action. That is no different, however, than any government "prosecutor" who must in good faith determine for itself whether a civil action in federal court should be brought—which necessarily includes a judgment whether a potential defendant violated the law or is "liable." The court is, nevertheless, the first body to formally determine liability, and therefore a civil prosecutor typically lacks authority to issue substantive regulations to interpret a statute establishing liability. *See, e.g., EEOC v. Arabian Am. Oil Co.*, 111 S. Ct. 1227, 1235 (1991); *Skidmore v. Swift & Co.*, 323 U.S. 134, 137–38 (1944).

To be sure, the agency also has authority, when imminent danger of harm exists, to issue administrative orders under section 106(a) requiring private parties to clean up a site. And, if the party refuses, section 106(b)(1) authorizes EPA to seek compliance in federal court. But, under the statute, a respondent must comply with such orders whether or not it is liable. Liability issues are resolved when the party against whom the order was levied seeks reimbursement under section 106(b)(2). The statutory scheme might be described as requiring parties to shoot first (clean up) and ask questions (determine who bears the ultimate liability) later.

That brings us to EPA's strongest argument—that its role in implementing the reimbursement provisions of section 106(b)(2) implies authority to define liability. Under that section, a party that has cleaned up a contaminated site pursuant to an administrative order may petition the EPA for reimbursement of its reasonable costs. If EPA refuses, a federal court may order reimbursement if it determines that the party is not liable or, even if liable, that the party has demonstrated that the cleanup actions it was ordered to take were arbitrary and capricious or otherwise unlawful. 42 U.S.C. § 9606(b)(2)(C)-(D). By implication, EPA argues that it must decide these liability questions when it determines whether or not to reimburse.

A careful reading of that provision, and the entire subsection 106(b),[4] leads us to a contrary view. Although a party must first petition EPA for reimbursement under subparagraph 106(b)(2)(A), that provision is completely silent as to what criteria EPA uses to grant reimbursement.[5] If EPA denies reimbursement because the agency contends the party is liable, the party has a right to bring an action in federal court under subparagraph 106(b)(2)(B); if the party establishes that it is not liable by a *preponderance of the evidence*, under subparagraph 106(b)(2)(C) it prevails. EPA is, under

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[4] Section 106(b) provides in relevant part:

> (2)(A) Any person who receives and complies with the terms of any order issued under subsection (a) of this section may, within 60 days after completion of the required action, petition the President for reimbursement from the Fund for the reasonable costs of such action, plus interest....
>
> (B) If the President refuses to grant all or part of a petition made under this paragraph, the petitioner may within 30 days of receipt of such refusal file an action against the President in the appropriate United States district court seeking reimbursement from the Fund.
>
> (C) Except as provided in subparagraph (D), to obtain reimbursement, the petitioner shall establish by a preponderance of the evidence that it is not liable for response costs under section 9607(a) of this title and that costs for which it seeks reimbursement are reasonable in light of the action required by the order.
>
> (D) A petitioner who is liable for response costs under section 9607(a) of this title may also recover its reasonable costs of response to the extent that it can demonstrate, on the administrative record, that the President's decision in selecting the response action ordered was arbitrary and capricious or was otherwise not in accordance with law....

42 U.S.C. § 9606(b).

[5] In fact, EPA may even reimburse a party who may be liable, since under section 122(a), EPA may enter into an agreement with any party to cleanup a hazardous waste site (including the owner or operator of the site) and under section 122(b) agree in advance to reimburse that party for its costs. 42 U.S.C. §§ 9622(a), (b)(1).

that scenario, only a defendant; its preliminary conclusion that the party was liable is entitled to no consideration, let alone the deference afforded to the typical administrative agency adjudication. On the other hand, a petitioner who *is* liable may nevertheless seek review under subparagraph 106(b)(2)(D) to challenge the reasonableness of EPA's ordered response. In such a case, the party, "a petitioner," must establish *on the administrative record* that EPA's order was arbitrary and capricious or not in accordance with law, the familiar APA standard of review.

The drafters of subsection 106(b) appear to us to have quite consciously distinguished between EPA's role in determining the appropriate cleanup action (which is entitled to deference under 106(b)(2)(D)) from the agency's position on liability when a party disputes claims. Liability issues are to be decided by the court, and therefore although EPA may well enjoy authority to issue regulations interpreting or implementing subparagraph 106(b)(2)(D), it does not seem that Congress intended the same authority with respect to subparagraphs 106(b)(2)(B) and (C).

That reading of section 106(b)(2) conforms with the provisions of CERCLA that provide for a private right of action in federal court by property owners or states to recover cleanup costs, *see* 42 U.S.C. §§ 9607(a)(1–4), 9613(b), 9613(f); *3550 Stevens Creek Assocs. v. Barclays Bank of Cal.*, 915 F.2d 1355, 1357 (9th Cir. 1990), *cert. denied*, 111 S. Ct. 2014 (1991), from those liable for the contamination. Questions of liability, accordingly, can be put at issue in federal court by disputing private parties—without any government involvement. Under these circumstances, it cannot be argued that Congress intended EPA, one of many potential plaintiffs, to have authority to, by regulation, define liability for a class of potential defendants.[6] Indeed, it was that very factor that

[6] When EPA grants reimbursement under section 106(a) because it believes that a claimant is *not* liable it does, as the government points out, make a determination as to liability, but that determination does not bind—indeed it has no effect on—a district court in an action brought against the claimant by a third party under section

led the Court in *Adams Fruit Co. v. Barrett*, 494 U.S. 638, 650 (1990), to reject the Department of Labor's regulation as unauthorized. The Court said: "Congress has expressly established the Judiciary and not the Department of Labor as the adjudicator of *private rights of action* arising under the statute." *Id.* at 649 (emphasis added). Just so here. Congress, by providing for private rights of action under section 107, has designated the courts and not EPA as the adjudicator of the scope of CERCLA liability.[7] And Congress did so quite deliberately. *See* 126 Cong. Rec. 30,932 (1980) (statement of Sen. Randolph) ("It is intended that issues of liability not resolved by this act, if any, shall be governed by traditional and evolving principles of common law.").

III.

There remains the question of whether the regulation can be sustained as an interpretative rule. The preamble to the final regulation suggests that EPA attempted to straddle two horses—issuing the rule as a legislative regulation but asserting in the alternative that as an interpretative rule, it would still be entitled to judicial deference and therefore affect private party litigation. 57 Fed. Reg. 18,344, 18,368 (1992). Although we have admitted that the distinction between legislative and interpretative rules is "enshrouded in considerable smog," *General Motors Corp. v. Ruckelshaus*, 742 F.2d 1561, 1565 (D.C. Cir. 1984) (en banc) (quotations omitted), it is commonly understood that a rule is legislative if it is "based on an agency's power to exercise *its judgment* as to how best to implement a general statutory mandate," *American Mining Congress v. Mine Safety & Health Admin.*, 995 F.2d 1106, 1110 (D.C. Cir. 1993) (quotations omitted) (emphasis

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107. And, after all, EPA can reimburse a party based on reasons other than non-liability. *See* 42 U.S.C. §§ 9606(b)(2)(A), 9622(b)(1).

[7] Likewise, subparagraph (b)(2)(A)'s "receives and complies" provision at issue in *Wagner Seed* has relevance only to the party seeking reimbursement and the government and, therefore, does not impinge upon a third party's private right of action under section 107. *See Wagner Seed*, 946 F.2d at 923.

added), and has the binding force of law. *Id.* at 1109. By contrast, an interpretative rule "is based on specific statutory provisions," *United Technologies Corp. v. EPA*, 821 F.2d 714, 719 (D.C. Cir. 1987), and represents the agency's construction of the statute that is—while not binding—entitled to substantial judicial deference under *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842–43 (1984).

The rule bears little resemblance to what we have traditionally found to be an interpretative regulation. EPA does not really define specific statutory terms, but rather takes off from those terms and devises a comprehensive regulatory regimen to address the liability problems facing secured creditors. This extensive quasi-legislative effort to implement the statute does not strike us as merely a construction of statutory phrases, as was so in *Wagner Seed*. *See National Family Planning & Reproductive Health Ass'n, Inc. v. Sullivan*, 979 F.2d 227, 237 (D.C. Cir. 1992); *Chamber of Commerce v. OSHA*, 636 F.2d 464, 469 (D.C. Cir. 1980).

In any event, the same reason that prevents the agency from issuing the rule as a substantive regulation precludes judicial deference to EPA's offered "interpretation." If Congress meant the judiciary, not EPA, to determine liability issues—and we believe Congress did—EPA's view of statutory liability may not be given deference. "A precondition to deference under *Chevron* is a congressional delegation of administrative authority." *Adams Fruit Co. v. Barrett*, 494 U.S. 638, 649 (1990). *Chevron*, which sets forth the reigning rationale for judicial deference to agency interpretation of statutes, is premised on the notion that Congress implicitly delegated to the agency the authority to reconcile reasonably statutory ambiguities or to fill reasonably statutory interstices. Where Congress does not give an agency authority to determine (usually formally) the interpretation of a statute in the first instance and instead gives the agency authority only to bring the question to a federal court as the "prosecutor," deference to the agency's interpretation is inappropriate. *See*

United States v. Western Elec. Co., 900 F.2d 283, 297 (D.C. Cir. 1990). As we have explained, that is all that EPA can do regarding liability issues. Moreover, even if an agency enjoys authority to determine such a legal issue administratively, deference is withheld if a private party can bring the issue independently to federal court under a private right of action. *See Litton Fin. Printing Div. v. NLRB*, 111 S. Ct. 2215, 2223 (1991) (citing *Local Union 1395, International Brotherhood of Elec. Workers v. NLRB*, 797 F.2d 1027, 1030–31 (D.C. Cir. 1986)) (NLRB's interpretation of a collective bargaining agreement not entitled to deference since private parties can come to federal court independently to enforce those agreements). Petitioners are such private parties; they wish to preserve the right to sue lenders when, in petitioners' view, a lender's behavior transgresses the statutory test—whether or not EPA would regard the lender as liable. As we read the statute, Congress intended that petitioners' claim in such an event should be evaluated by the federal courts independent of EPA's institutional view.[8]

Petitioners conceded that the regulation could be sustained as a policy statement that would guide EPA's enforcement proceedings across the country, but EPA has not asked that its regulation be so regarded. Furthermore, intervenors point out that if the regulation were to affect only EPA's enforcement proceedings, lenders would still face potentially staggering liability because of the generality of the statutory language and the prospect of private suits. That potential liability would force lenders to behave cautiously even if EPA were to adhere to the regulation as its policy. Given our uncertainty as to EPA's wishes, we think the proper course is to vacate the rule and leave EPA free to take whatever steps it thinks appropriate.

• • • •

[8] EPA may well be brought into such an action as a third party and, of course, its litigator's view would be entitled to the same respect that a court would give any litigant. That is not "deference."

We well recognize the difficulties that lenders face in the absence of the clarity EPA's regulation would have provided. Before turning to this rulemaking, EPA sought congressional relief and was rebuffed. We see no alternative but that EPA try again. The petition for review is granted and the regulation is hereby vacated.

So Ordered.

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United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

Argued October 28, 1993 Filed March 1, 1994

No. 92-1312

FRANK J. KELLEY, ATTORNEY GENERAL OF THE STATE OF MICHIGAN,
FRANK J. KELLEY, EX REL. STATE OF MICHIGAN,
MICHIGAN DEPARTMENT OF NATURAL RESOURCES,
FRANK J. KELLEY,
PETITIONERS

v.

ENVIRONMENTAL PROTECTION AGENCY,
WILLIAM K. REILLY, ADMINISTRATOR,
RESPONDENTS

AMERICAN BANKERS ASSOCIATION,
EQUIPMENT LEASING ASSOCIATION OF AMERICA,
COMMERCIAL FINANCE ASSOCIATION,
AMERICAN COUNCIL OF LIFE INSURANCE,
AMERICAN COLLEGE OF REAL ESTATE LAWYERS,
INTERVENORS

Bills of costs must be filed within 14 days after entry of judgment. The court looks with disfavor upon motions to file bills of costs out of time.

No. 92-1314

CHEMICAL MANUFACTURERS ASSOCIATION,
PETITIONER

v.

ENVIRONMENTAL PROTECTION AGENCY,
RESPONDENT

AMERICAN BANKERS ASSOCIATION,
EQUIPMENT LEASING ASSOCIATION OF AMERICA,
COMMERCIAL FINANCE ASSOCIATION,
AMERICAN COUNCIL OF LIFE INSURANCE,
AMERICAN COLLEGE OF REAL ESTATE LAWYERS,
INTERVENORS

Petition for Review of Orders of the
Environmental Protection Agency

Jeremy M. Firestone, Assistant Attorney General, State of Michigan, argued the cause for petitioners Michigan Attorney General Frank J. Kelley, the State of Michigan and the Michigan Department of Natural Resources in No. 92-1312. With him on the briefs was *Thomas L. Casey*, Solicitor, State of Michigan.

Theodore L. Garrett, argued the cause for petitioner Chemical Manufacturers Association in No. 92-1314. With him on the briefs were *David F. Zoll* and *Dell E. Perelman*.

Bradley M. Campbell, Attorney, United States Department of Justice, argued the cause for respondents. With him on the brief was *Earl C. Salo*, Counsel, United States Environmental Protection Agency. *Michael A. McCord*, Attorney, United States Department of Justice, entered an appearance for respondents.

On the joint brief for intervenors American Bankers Association et al., and *amicus curiae*, Mortgage Bankers Association of America were *John J. Gill, Thomas J. Greco, Michael F. Crotty, Roger D. Schwenke, Margaret V. Hathaway, Howard L. Feinstein, Robert S. McConnaughey, Samuel I. Gutter, David T. Buente, Jr., Edwin E. Huddleson, III,* and *William E. Cumberland. Richard R. Goldberg* entered an appearance for intervenor American College of Real Estate Lawyers in Nos. 92–1312 and 92–1314.

Before: MIKVA, *Chief Judge*, SILBERMAN and HENDERSON, *Circuit Judges.*

Opinion for the Court filed by *Circuit Judge* SILBERMAN.*

Dissenting opinion filed by *Chief Judge* MIKVA.

MIKVA, *Chief Judge*, dissenting: The Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA"), 42 U.S.C. § 9601 *et seq.*, subjects four classes of parties to potential liability for hazardous waste cleanup costs: (1) the current owner and operator of a facility where hazardous substances are located; (2) any person who owned or operated the facility at the time of disposal of hazardous substances; (3) any person who arranged for the disposal of hazardous substances; and (4) any person who accepted hazardous substances for transport to a treatment facility or disposal site. 42 U.S.C. § 9607(a). Under CERCLA, the term "owner or operator" includes any person "owning or operating" a site of environmental contamination but "does not include a person who, without participating in the management of a vessel or facility, holds indicia of ownership primarily to protect his security interest in the vessel or facility." 42 U.S.C. § 9601(20)(A). This exception, known as the secured lender exemption, lies at the heart of this appeal.

In 1991, the EPA commenced a rulemaking to "specify the range of activities that may be undertaken" by secured lenders without incurring CERCLA liability. 56 Fed. Reg. 28,798, 28,799 (June 24, 1991). In 1992, the EPA adopted its Final Rule on Lender Liability Under CERCLA which pro-

* The opinion for the Court was filed February 4, 1994.

vided that: (1) prior to foreclosure, a lender is subject to CERCLA liability only if she actually exercises decisionmaking control over the borrower's environmental compliance, or over all or substantially all of the operational aspects of the enterprise, 40 C.F.R. § 300.1100(c)(1) (1992); and (2) after foreclosing, a lender remains exempt from CERCLA liability so long as she takes steps to divest herself of the property in a prompt and commercially reasonable manner, 40 C.F.R. § 300.1100(d)(1) (1992). The EPA intended that these regulations would bind all parties in CERCLA litigation, regardless of whether the United States was a party to the suit. 57 Fed. Reg. 18,344, 18,363 (April 29, 1992).

Michigan and the Chemical Manufacturers Association filed petitions for review of the EPA Final Rule because, as potential litigants, they did not want to be foreclosed from recovering cleanup costs from those secured lenders that the Final Rule exempts from CERCLA liability. Petitioners argue, and the majority agrees, that the Final Rule is invalid because Congress delegated to the courts, rather than to the Executive branch, authority to interpret the scope of CERCLA's secured lender exemption. I disagree. CERCLA's language, structure and legislative history suggest that Congress implicitly delegated to the President (who in turn delegated to the EPA) the authority to interpret who falls within the scope of CERCLA's regulatory regime. Accordingly, the EPA's Final Rule on Lender Liability Under CERCLA is entitled to *Chevron* deference from this court. *See Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). I would uphold the Rule.

A. Delegation of Authority

When Congress enacted CERCLA in 1980, it implicitly delegated authority to the EPA to define which parties fell within the statute's regulatory regime. For example, CERCLA charged the EPA Administrator with responsibility for prescribing the manner and form by which owners and operators were to notify the agency of hazardous waste storage, treatment or disposal at their facilities. 42 U.S.C. § 9603(c). CERCLA also authorized the EPA Administrator

to promulgate rules and regulations specifying the record-keeping requirements to which owners and operators of hazardous waste facilities were subject and vested the EPA Administrator with discretion to waive those requirements on petition from those parties. 42 U.S.C. § 9603(d). In addition, CERCLA authorized the President, who in turn authorized the EPA, to undertake those remedial actions necessary to contain or remove hazardous substances at-risk of release "unless the President determine[d] that such removal and remedial action w[ould] be done properly by the owner or operator of the vessel or facility from which the release or threat of release emanate[d]." 42 U.S.C. § 9604(1). CERCLA also authorized the EPA to issue abatement orders to those parties responsible for particularly dangerous hazardous wastes. 42 U.S.C. § 9606. To administer each of these subsections effectively, the EPA was obliged to construe the term "owner or operator" within the meaning of CERCLA; Congress implicitly delegated authority to the EPA, as the administering agency, to do so. *See Wagner Seed Co., Inc. v. Bush*, 946 F.2d 918, 923 (D.C. Cir. 1991), *cert. denied*, 112 S. Ct. 1584 (1992). Consequently, the EPA's construction of "owner or operator" is entitled to *Chevron* deference. *See Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 831 (1984).

The overall structure of CERCLA's statutory scheme suggests that Congress delegated authority to the Executive to construe the scope of CERCLA's statutory coverage. In CERCLA § 101, Congress defined key statutory terms. Typically, statutes contain these definitional sections to frame an agency's delegated authority to interpret ambiguous statutory language. It would be unusual if not anomalous for Congress to have included, and left undifferentiated among CERCLA's statutory definitions, the term "owner or operator" had Congress not intended to delegate authority to the EPA to interpret this concededly ambiguous statutory term. In interpreting the statute otherwise, the majority renders the EPA powerless to define not only the term "owner or operator" within the meaning of CERCLA, but "vessel," "facility," "transport" and "transportation" as well. Inter-

preting CERCLA in this manner generates serious confusion within the statute's "comprehensive" regulatory regime.

The majority arrives at its statutory interpretation by passing over much of CERCLA's language, structure and legislative history and concentrating instead on the preponderance-of-the-evidence standard embodied in CERCLA § 106(b)(2)(C). This standard of review signals to the majority that Congress intended to reserve all determinations of CERCLA liability, including the scope of statutory coverage, for the courts. In my view, the majority misreads the statute and misinterprets congressional intent. The preponderance-of-the-evidence standard embodied in CERCLA § 106(b)(2)(C) simply reflects continued congressional intent to have common law principles govern determinations of proximate causation regarding hazardous waste contaminations.

Congress amended CERCLA in 1986 to provide, *inter alia*, a reimbursement mechanism for certain parties that receive and comply with EPA abatement orders. Pursuant to CERCLA § 106(b)(2)(C), a party is entitled to reimbursement of its abatement costs if it can establish "by a preponderance of the evidence that it is not liable for response costs under 9607(a)." 42 U.S.C. § 9606(b)(2)(C). Significantly, the legislative history of the 1986 amendments is devoid of any reference to, much less debate regarding, rescinding authority from the EPA to interpret who falls within the scope of CERCLA's statutory coverage. That is because § 106(b)(2)(C) does not and was not intended to strip the EPA of this authority. The preponderance-of-the-evidence standard employed in § 106(b)(2)(C) simply restates the preponderance standard already employed in § 107(b).

CERCLA § 107, entitled "Liability," provides in subsection (a) that "the owner and operator of a vessel or facility" as well as other specified parties "shall be liable" for response costs. Subsection (b), entitled "Defenses," provides that:

> There shall be no liability under subsection (a) of this section for a person otherwise liable who can establish by a *preponderance of the evidence* that the release or

> threat of release of a hazardous substance and the damages resulting therefrom were caused solely by—
> (1) an act of God;
> (2) an act of war;
> (3) an act or omission of third party other than an employee or agent of the defendant ... if the defendant establishes by a preponderance of the evidence that (a) he exercised due care with respect to the hazardous substance concerned ... and (b) he took precautions against foreseeable acts or omissions of any such third party and the consequences that could foreseeably result from such acts or omissions.

42 U.S.C. § 9607 (emphasis added). Thus, when it enacted CERCLA in 1980, Congress did not subject the EPA's interpretation of "owner or operator," or other key statutory terms which define the scope of CERCLA's coverage, to the preponderance-of-the-evidence standard. Congress deliberately structured § 107 so that only issues of *causation* were subject to this standard of review. Indeed, the legislative history of CERCLA § 107 indicates that Congress adopted the preponderance-of-the-evidence standard in subsection (b) to ensure that "the usual common law principles of causation, including those of proximate causation, [w]ould govern the determination of whether a defendant 'caused or contributed' to a release or threatened release." H.R. Rep. No. 96–1016, 96th Cong., 2nd Sess., pt. 2 at 33 (1980), *reprinted in* 1980 U.S.C.C.A.N. 6119, 6136.

On this reading of the statute, a party that receives and complies with an EPA abatement order is entitled to reimbursement of costs incurred if it can prove by a preponderance of the evidence, as required by § 107(b), that it did not proximately cause the contamination. In § 106(b)(2)(B), Congress afforded EPA the first crack at making these particularized determinations of causality. However, Congress wanted "traditional rules of foreseeability, causation, and certainty" ultimately to govern determinations of CERCLA liability. H.R. Rep. No. 99–253(I), 99th Cong., 2nd Sess. at 83 (1986) *reprinted in* 1986 U.S.C.C.A.N. 2835, 2865. Accord-

ingly, Congress incorporated into CERCLA § 106(b)(2)(C) the preponderance standard set forth in § 107(b). In so doing Congress changed little. Under CERCLA § 106(b)(2)(C), as in the rest of the statute, determinations of causality rest ultimately with the courts while most other determinations, including who falls within the scope of CERCLA's statutory coverage, are for the EPA and are entitled to *Chevron* deference.

B. Private Right of Action

The majority bolsters its interpretation of CERCLA § 106 by reference to the private right of action that CERCLA confers on third parties. According to the majority, "[i]t cannot be argued that Congress intended EPA, one of many potential plaintiffs, to have authority to, by regulation, define liability for a class of potential defendants." *Kelley v. E.P.A.*, No. 92–1312, slip op. at 12 (D.C. Cir. Feb. 4, 1994), 1994 U.S. App. LEXIS 1715. The majority offers no explanation of why that argument would be untenable. There is every reason to hold that Congress created the private right of action to facilitate enforcement of CERCLA's statutory scheme within the parameters of lender liability which the EPA, as the administering agency, would define.

According to the majority, *Adams Fruit Co. v. Barrett*, 494 U.S. 638 (1990) renders implausible the interpretation of CERCLA § 106(b)(2)(C) offered above. It reads *Adams Fruit* to hold that the mere presence of a private right of action reflects a congressional intent to assign to the judiciary, rather than to the administrative agency, exclusive authority to define the scope of statutory liability. I disagree.

At issue in *Adams Fruit* was whether Congress had delegated to the Department of Labor the authority to interpret the preemptive scope of the private right of action created by the Agricultural Workers Protection Act. Because the Department of Labor, ("DOL"), which was responsible for administering the Act, was not charged in any respect with administering the statute's private right of action, the Court held that no deference was due DOL regulations defining the interplay between those actions and the exclusivity provisions

of the state worker compensation schemes. In promulgating such regulations, DOL had simply "bootstrap[ped] itself into an area in which it ha[d] no jurisdiction." *Adams Fruit Co. v. Barrett*, 494 U.S. 638, 650 (1990). By contrast, the EPA must interpret the scope of CERCLA's lender liability provisions "in the first instance" in order to fulfill its administrative responsibilities under CERCLA §§ 103, 104, and 106. Thus, unlike DOL in *Adams Fruit*, the EPA is not construing CERCLA's private right of action *per se* when it construes the term "owner or operator" within the meaning of CERCLA. CERCLA's private right of action thus provides scant support for concluding, as the majority does, that Congress reserved all determinations of liability under CERCLA for the courts.

C. *Chevron* Analysis

In my view, the EPA did not exceed the scope of its delegated authority in promulgating regulations that construe the meaning of "owner or operator" within the meaning of CERCLA. Because CERCLA's secured lender exemption lacks a plain meaning and the EPA's Final Rule does not construe that exemption unreasonably, I would deny the petition and uphold the EPA's Final Rule under *Chevron*.

APPENDIX B

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United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

Filed June 14, 1994

No. 92-1312

FRANK J. KELLEY, ATTORNEY GENERAL OF THE STATE OF MICHIGAN,
FRANK J. KELLEY, EX REL. STATE OF MICHIGAN,
MICHIGAN DEPARTMENT OF NATURAL RESOURCES,
FRANK J. KELLEY,
PETITIONERS

v.

ENVIRONMENTAL PROTECTION AGENCY,
WILLIAM K. REILLY, ADMINISTRATOR,
RESPONDENTS

AMERICAN BANKERS ASSOCIATION,
EQUIPMENT LEASING ASSOCIATION OF AMERICA,
COMMERCIAL FINANCE ASSOCIATION,
AMERICAN COUNCIL OF LIFE INSURANCE,
AMERICAN COLLEGE OF REAL ESTATE LAWYERS,
INTERVENORS

Bills of costs must be filed within 14 days after entry of judgment. The court looks with disfavor upon motions to file bills of costs out of time.

No. 92-1314

CHEMICAL MANUFACTURERS ASSOCIATION,
PETITIONER

v.

ENVIRONMENTAL PROTECTION AGENCY,
RESPONDENT

AMERICAN BANKERS ASSOCIATION,
EQUIPMENT LEASING ASSOCIATION OF AMERICA,
COMMERCIAL FINANCE ASSOCIATION,
AMERICAN COUNCIL OF LIFE INSURANCE,
AMERICAN COLLEGE OF REAL ESTATE LAWYERS,
INTERVENORS

On Petition for Rehearing

Lois J. Schiffer, Acting Assistant Attorney General, *Bradley M. Campbell*, Attorney, United States Department of Justice, and *Earl Salo*, Counsel, United States Environmental Protection Agency, filed a Petition for Rehearing and Suggestion for Rehearing En Banc on behalf of respondents.

John J. Gill, *Thomas J. Greco*, *Michael F. Crotty*, Counsel, American Bankers Association, *Samuel I. Gutter*, *David T. Buente, Jr.*, Counsel, Commercial Finance Association, *Roger D. Schwenke*, Counsel, American College of Real Estate Lawyers, *Margaret V. Hathaway*, *Howard L. Feinstein*, Counsel, American Council of Life Insurance, *Phillip E. Stano*, Counsel, American Council of Life Insurance, and *Edwin E. Huddleson, III*, Counsel, Equipment Leasing Association of America, filed a Petition for Rehearing and Suggestion for Rehearing En Banc on behalf of intervenors.

Thomas L. Casey, Solicitor General, State of Michigan, and *Jeremy M. Firestone*, Assistant Attorney General, State of Michigan, filed a Response to Petitions for Rehearing and Suggestions for Rehearing En Banc on behalf of petitioners Michigan Attorney General Frank J. Kelley, the State of Michigan, and the Michigan Department of Natural Resources.

Theodore L. Garrett, *David F. Zoll*, General Counsel, and *Dell E. Perelman*, Senior Assistant General Counsel, filed a Response to Petitions for Rehearing and Suggestions for Rehearing En Banc on behalf of petitioner Chemical Manufacturers Association.

Before: MIKVA, *Chief Judge*, SILBERMAN, and HENDERSON, *Circuit Judges*.

Opinion for the Court filed by *Circuit Judge* SILBERMAN.*

SILBERMAN, *Circuit Judge*: The government and intervenors—dropping most of their statutory arguments before the panel—petition for rehearing based largely on our colleague's dissent (which issued after our opinion and therefore to which we did not refer). We held that Congress had not authorized EPA to issue substantive regulations that determined under what circumstances a lender is to be deemed an "owner and operator of a vessel or facility" as used in CERCLA § 107 (and thus liable thereunder) because that section, and section 106, command that liability issues are to be resolved in federal district court. Therefore, Congress did not implicitly delegate to EPA—one of the possible litigants—authority to specify when a lender will be regarded as an owner or operator. Indeed, Congress itself in the definitional section of the statute (section 101) explicitly stated that the term owner or operator "does not include a person who without participating in the management of a vessel or facility holds indicia of ownership primarily to protect his security interest in the vessel or facility." 42 U.S.C. § 9601(20)(A). The Chief Judge agreed that some liability issues were to be determined *de novo* by the district court under the familiar preponder-

* *Chief Judge* MIKVA would grant the petition for rehearing.

ance of evidence standard, but he thought they were limited to questions of causation set forth in section 107(b):

> (b) Defenses
>
> There shall be no liability under subsection (a) of this section for a person otherwise liable who can establish by a preponderance of the evidence that the release or threat of release of a hazardous substance and the damages resulting therefrom were caused solely by—
>
> (1) an act of God;
>
> (2) an act of war;
>
> (3) an act or omission of a third party other than an employee or agent of the defendant ...; or
>
> (4) any combination of the foregoing paragraphs.

42 U.S.C. § 9607 (1988). What the Chief Judge referred to as "coverage" questions on the other hand—just which party can be deemed responsible, pursuant to section 107(a), for causing liability—were, according to Judge Mikva, to be treated differently: Congress authorized EPA to advance its views on those questions through substantive regulations entitled to *Chevron* deference.

Judge Mikva relied on scattered provisions of the statute which do not directly bear on any parties' liability—let alone that of a lender. For instance, section 103(c) authorizes EPA to prescribe the manner and form by which owners and operators are to notify the agency of hazardous waste storage, treatment, or disposal at their facilities, and section 103(d) authorizes EPA to promulgate rules and regulations specifying recordkeeping requirements to which owners and operators, *inter alia*, are subject. But to be authorized to prescribe the manner and form by which normal owners and operators are to report to the agency is not necessarily to be authorized to determine the specific circumstances under which a lender would be an owner and operator and therefore liable for hazardous waste clean up. Judge Mikva argued that to implement these sections "effectively" EPA was obliged to define the terms owner and operator generally. Even that does not seem to be so. EPA's specific responsibil-

ity under section 103(c) is merely to pass the reported information on to state agencies, and importantly, the agency was granted no authority to enforce that section. An entity who refused to notify EPA could only be prosecuted criminally (by the Justice Department) and only for a willful violation—which certainly would not extend to a good faith belief that one was not, under the circumstances, an owner or operator.[1]

In addition, Judge Mikva relied on EPA's authority to "undertake" remedial action at its own expense to deal with imminent dangers or to allow a qualified owner or operator (one who will act promptly and properly) to take the action itself. But EPA, which can agree with an entity to fund all or part of such activity, can, with respect to liability, only offer an agreement not to sue. *See* 42 U.S.C. § 9622(c)(1). The statute makes clear that such a covenant affects only that party's liability to the United States, and "[i]n no event shall a potentially responsible party be subject to a lesser standard of liability" by virtue of its agreement to undertake remedial action under section 104 and to be reimbursed by EPA. 42 U.S.C. § 9604(a)(1); *see also* 42 U.S.C. § 9622(c)(1). And section 122, which section 104 cross-references, specifically provides that EPA "shall make all reasonable efforts to recover the amount of such reimbursement under section 9607 of this title [CERCLA § 107]...." 42 U.S.C. § 9622(b)(1). In other words, as we emphasized in our original opinion,[2] the drafters always came back to the liability provisions of section 107, which calls for a judicial determination.

It seems to us, moreover, that there are analytical difficulties with the Chief Judge's approach to section 107, which would divide up authority over liability issues between "coverage" and "causation." Issues of coverage—the "who" ques-

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[1] Under section 109 a civil penalty may also be imposed for a 103(d) violation, but only for willful destruction or falsification of records, conduct prohibited by paragraph 103(d)(2).

[2] See *Kelley v. EPA*, 15 F.3d 1100, 1106–07 (D.C. Cir. 1994) discussing abatement orders and reimbursement decisions under section 106, upon which the Chief Judge also relies.

tions—are intertwined with what Judge Mikva terms causation—the "what" questions—and, therefore, it would be terribly difficult for federal courts to defer to an EPA regulation as to who might be liable without overlapping into the question of what caused the injury to the environment. In that respect—and we think this point is, by itself, determinative—even if EPA might be thought to enjoy authority to define "owner or operator" for some purposes, the stated regulation before us does not even purport to define those terms. Instead, EPA issued its extensive regulation to define:

> three key terms found in the exemption that are not otherwise defined in CERCLA: (1) "Indicia of ownership," (2) the requirement that the ownership indicia be held "primarily to protect [a] security interest," and (3) the prohibition of the holder from "participating in the management" of the facility.

57 Fed. Reg. 18374 (1992). The words "definition" and "coverage" as used by the Chief Judge and the government are therefore misleading insofar as they imply connotations of status under the Act. The agency has not really offered coverage definitions but rather has presented its view, in the form of a regulation, of the circumstances under which a lender will not be liable for a facility's release of hazardous waste.

The Chief Judge's dissent and the government's petition for rehearing thus ignore the genesis of the regulation before us—that it is an effort to issue a legislative "holding" as to the circumstances under which a lender would be liable, rather than to publish a definition of owner or operator. But even if one viewed the regulation as does the Chief Judge, section 107 provides no support for the notion that courts decide the causation aspects of liability while EPA retains authority to define terms of "coverage." Section 107(a) sets forth the general grounds whereby liability is imposed on persons, including "any person who at the time of disposal of any hazardous substance owned or operated any facility at which such hazardous substances were disposed of...." 42 U.S.C. § 9607(a)(2) (1988). It follows that a plaintiff, whether

or not EPA, who wishes to claim that "X" is liable under subsection (a)(2) must prove that "X" was the owner or operator at the time of disposal. Since the proceeding to establish that claim is in federal district court, in the absence of any language to the contrary, Congress must have meant that the plaintiff bore the burden to prove those facts by a preponderance of the evidence. After all, that is the evidentiary standard of proof in a federal civil proceeding. *See* 9 WIGMORE ON EVIDENCE § 2498, at 419 (Chadbourn rev. 1981).

To be sure, as the dissent emphasized, section 107(b) (Defenses) does explicitly refer to "preponderance of the evidence" whereas section 107(a) does not, but that is because Congress put the burden of proof to establish 107(b) defenses on the defendant. Congress thus had to refer to the preponderance of evidence standard in subsection (b) because it wished to make clear that, as to those defenses, the burden was switched. *Cf. Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248, 256–58 (1981) (holding that defendants under Title VII, where Congress had placed the burden of proof on plaintiffs, need not prove defenses by a preponderance of the evidence). There is no indication, however, that the evidentiary standard was meant to be any different in section 107(a) than in (b).

The government makes the same primary argument as does the Chief Judge—that "Congress delegated to EPA the authority to construe ambiguous terms that bear on section 107 liability." But, tellingly, the government never asserts that the regulation can be justified as an effort to define "owner or operator"; indeed, the petition for rehearing never points precisely to the terms EPA regards as ambiguous. The government also apparently recognizes the difficulties presented by the dissent's reading of section 107 because it does not embrace the Chief Judge's bifurcated approach to that section. Rather, EPA on rehearing argues that the preponderance of evidence standard applies to factual issues but not legal determinations. Of course, the government is right, but its proposition is beside the point. We did not suggest that section 107 liability issues that could be de-

scribed as legal rather than factual would be decided as evidentiary questions. We thought the preponderance of evidence standard was significant only because it is not a standard used for judicial review of agency action but rather for a trial *de novo*.

It will be recalled that the government had relied on section 106, which authorizes EPA to reimburse a party for its costs in complying with an EPA clean-up order, as support for its claim that the agency may issue regulations defining liability. The weakness in EPA's argument, as we pointed out in our opinion, is that only subparagraph 106(b)(2)(D), which assumes liability is established and which relates to whether EPA's clean-up order was "*arbitrary and capricious*" (presumably excessive) "as demonstrated by the *administrative record*," uses administrative law terms. Subparagraph 106(b)(2)(C), speaking to liability, on the other hand, employs the phrase "preponderance of evidence" (a non-administrative law standard) and cross-references subsection 107(a)—thus making clear that liability issues were to be determined *de novo* in federal district court.

We thought that our reading of sections 106 and 107—that Congress put all liability issues (fact and law) to the federal district courts—accorded with the creation of private rights of action under the statute whereby persons or states could sue those liable without EPA's participation or permission. The government complains that we failed to explain why the creation of private rights of action "should diminish EPA's claim to deference in resolving statutory questions." We admit we thought the point was obvious. *See Office of Professional Employees Int'l Union, Local 2 v. FDIC*, 962 F.2d 63, 65 (D.C. Cir. 1992) (disposing of the issue in one paragraph). When Congress delegates all the adjudicatory functions under a statute to an administrative agency subject only to APA-like judicial review of the agency's decisions, it is presumed that Congress wishes the agency to enjoy a good deal of leeway to interpret statutory terms, either by regulation or through the adjudication itself. That presumption, articulated most notably in the famous case, *Chevron USA Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837

(1984), is based on the notion that Congress would wish an agency with political authority, rather than the judiciary, to exercise the policy choices implicit in statutory interpretation of ambiguous terms. Moreover, *Chevron* deference permits a greater degree of national uniformity with respect to the interpretation of a statute administered by an agency enjoying that deference. But, as Justice Scalia has warned, the assumption is just that, and Congress may always act to the contrary. *See* Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 DUKE L.J. 511, 515–16 (1989). When Congress treats an agency only as a prosecutor without specific authority to issue regulations bearing on the questions prosecuted, we accordingly do not assume that Congress has delegated this sort of policymaking authority to the agency. *United States v. Western Elec. Co.*, 900 F.2d 283, 297 (D.C. Cir. 1990). That is so in this case, at least with respect to liability issues. And when on top of that prosecutorial function, as here, private rights of action are created—not requiring the participation of the agency at all—it seems somewhat strained to claim that Congress could be thought to have *implicitly* delegated to EPA the policymaking role that *Chevron* presumes (in pursuit of uniformity) to determine who should be liable under the statute. The structure of the statutory scheme is flatly inconsistent with the premise of *Chevron*.

That is not to say, of course, that Congress could not delegate substantive authority to interpret statutory terms to an agency in the mixed position that EPA occupies under CERCLA. It may well have done so, as the government contends, in other parts of the statute regardless of the private rights of action. It may also be true that Congress can and has delegated authority to issue substantive regulations to other agencies under statutory schemes that provide for private rights of action. We are concerned only with whether such authority, and accordant *Chevron* deference, was granted under particular sections of CERCLA. Although it might be thought that this court has gone a long way to recognize EPA's regulatory power under CERCLA, *see Wagner Seed Co., Inc. v. Bush*, 946 F.2d 918, 920 (D.C.

Cir. 1991), *cert. denied*, 112 S. Ct. 1584 (1992), we have insisted that each section of the statute be analyzed separately to determine whether EPA can assert authority to interpret, with *Chevron* deference, substantive terms. *See id.* at 923. Here, it must be remembered, we are not dealing just with section 107 which provides for judicial determination of liability. The terms which EPA wishes to define are not the general phrase owner or operator but the much more detailed language Congress fashioned in section 101(20)(A) to set forth the circumstances under which a lender would be held liable.

Finally, the government reiterates its powerful policy argument that EPA *should* have authority to provide lenders a much greater degree of certainty as to which action or circumstances will create lender liability. We said before that we, as judges, are powerless to respond to such arguments, no matter how meritorious the policy claims.

* * * *

Accordingly, we deny the petition for rehearing.

So ordered.

APPENDIX C

UNITED STATES COURT OF APPEALS
For The District of Columbia Circuit

NO. 92-1312 September Term, 1993

Frank J. Kelley, Attorney General of
The State of Michigan;
Department of Natural Resources,
Petitioners

V.

William K. Reilly, Administrator,
U.S. Environmental Protection Agency,
Respondents

---

and consolidated Case No. 92-1314

FILED FEB 04 1994
MANDATE issued 7/28/94

PETITION FOR REVIEW OF AN ORDER OF THE ENVIRONMENTAL PROTECTION AGENCY

Before: Mikva, Chief Judge; Silberman and Henderson, Circuit Judges

JUDGMENT

These causes came on to be heard on the petitions for review of an order of the U. S. Environmental Protection Agency and were argued by counsel. On consideration thereof, it is

ORDERED and **ADJUDGED**, by the Court, that the petitions for review are granted, in accordance with the Opinion for the Court filed herein this date.

Per Curiam
For The Court:
RON GARVIN, CLERK

By: /s/ Robert A. Bonner
Deputy Clerk

Date: February 4, 1994

Opinion for the Court filed by Circuit Judge Silberman.
Dissenting opinion filed by Chief Judge Mikva on March 1, 1994

APPENDIX D

UNITED STATES COURT OF APPEALS
For The District of Columbia Circuit

NO. 92-1312 September Term, 1993

Frank J. Kelley, Attorney General of
The State of Michigan;
Department of Natural Resources,
Petitioners

V.

William K. Reilly, Administrator,
U.S. Environmental Protection Agency,
Respondents

---

and consolidated Case No. 92-1314

FILED JUN 14 1994

Before: Mikva, Chief Judge; Silberman and Henderson, Circuit Judges

ORDER

Upon consideration of the petitions for rehearing of respondents and intervenors, it is

ORDERED, by the Court, that the petitions are denied.

Per Curiam
For The Court:
RON GARVIN, CLERK
By: /s/ Robert A. Bonner
Deputy Clerk

Chief Judge Mikva would grant the petitions for rehearing. Opinion for the Court filed by Circuit Judge Silberman

UNITED STATES COURT OF APPEALS
For The District of Columbia Circuit

NO. 92-1312 September Term, 1993

Frank J. Kelley, Attorney General of
The State of Michigan;
Department of Natural Resources,

Petitioners

V.

William K. Reilly, Administrator,
U.S. Environmental Protection Agency,

Respondents

---

and consolidated Case No. 92-1314

FILED JUN 14 1994

Before: Mikva, Chief Judge; Silberman, Buckley, Williams,Ginsburg,Sentelle, Henderson, Randolph and Rogers, Circuit Judges

ORDER

The Suggestions For Rehearing In Banc of respondents and intervenors and the responses thereto have been circulated to the full court. No member of the Court requested the taking of a vote thereon. Upon consideration of the foregoing it is

ORDERED, by the Court in banc, that the suggestions are denied.

Per Curiam
FOR THE COURT:
RON GARVIN, CLERK
BY:/s/ Robert Bonner
Deputy Clerk

Per Curiam
For The Court:
RON GARVIN,

CLERK

By: /s/ Robert A.

Bonner

Deputy

Clerk

Date: February 4, 1994

Opinion for the Court filed by Circuit Judge Silberman.

Dissenting opinion filed by Chief Judge Mikva on March 1, 1994

APPENDIX E

STATUTORY AND REGULATORY PROVISIONS INVOLVED

1. The Comprehensive Envrionmental Response, Compensation,and Liability Act (CERCLA or Superfund), 42 U.S.C. §9601 et seq., provides in relevant part:

42 U.S.C. §9601(20)(A). The term "owner or operator means (i) in the case of a vessel, any person owning, operating, or chartering by demise, such vessel, (ii) in the case of an onshore facility or an offshore facility, any person owning or operating such facility, and (iii) in the case of any facility, title or control of which was conveyed due to bankruptcy, foreclosure, tax delinquency, abandonment, or similar means to a unit of State or local government, any person who owned, operated or otherwise controlled activities at such facility immediately beforehand. Such term does not include a person, who, without participating in the management of a vessel or facility, holds indicia of ownership primarily to protect his security interest in the vessel or facility.

42 U.S.C. §9605(a). Within one hundred and eighty days after December 11, 1980, the President shall, after notice and opportunity for public comments, revise and republish the national contingency plan for the removal of oil and hazardous substances, originally prepared and published pursuant to section 1321 of Title 33, to reflect and effectuate the responsibilities and powers created by this chapter, in addition to those matters specified in section 1321(c)(2) of Title 33. . . .

42 U.S.C. §9613(a). Review of any regulation promulgated under this chapter may be had upon application by any interested person only in the Circuit Court of Appeals of the United States for the District of Columbia. Any such application shall be made within ninety days from the date of promulgation of such regulations. Any matter with respect to which review could have been obtained underthis subsection shall not be subject to judicial review in any civil or criminal proceeding for enforcement or to obtain damages or recovery of response costs.

42 U.8.C. §9615. The President is authorized to delegate and assign any duties or powers imposed upon or assigned to him and to promulgate any regulations necessary to carry out the provisions of this subchapter.

2. EPA's Rule on "Lender Liability under CERCLA," 57 Fed.Reg. 18344 (April 29, 1992), 40 C.F.R. §300.1100, provides in relevant part:

40 C.F.R. §300.1100 Security interest exemption.

A person who maintains indicia of ownership primarily to protect a security interest in a vessel or facility, and who does not participate in the management of the vesselor facility, is not an "owner or operator" of such vessel or facility under CERCLA section 107(a)(1) or section 107(a)(2). ....

(a) Indicia of ownership as used in section 101(20)(A) of CERCLA means

(b) Primarily to protect a security interest for the purposes of section 101(20)(A) of CERCLA means ....

(c) Participation in Management Defined. The term participating in the management of a vessel or facility means that the holder is engaging in acts of facility or vessel management, as defined herein.

(1) Actions That Are Participation in Management. Participation in the management of a facility means, for the purpose of section 101(20)(A), actual participation in the management or operational affairs of the vessel or facility by the holder, and does not include the mere capacity to influence, or ability to influence, or the unexercised right to control facility operations. A holder is participating in management, while the borrower is still in possession of the vessel or facility encumbered by the security interest, only if the holder either:

(i) Exercises decisionmaking control over the borrower's environmental compliance, such that the holder has undertaken responsibility for the borrower's hazardous substance handling or disposal practices; or

(ii) Exercises control at a level comparable to that of a manager of the

borrower's enterprise, such that the holder has assumed or manifested responsibility for the overall management of the enterprise encompassing the day-to-day decisionmaking of the enterprise with the respect to:

(A) Environmental compliance or

(B) All, or substantially all, of the operational (as opposed to financial or administrative) aspects of the enterprise other than environmental compliance. Operational aspects of the enterprise include functions such that of facility or plant manager, operations manager, chief operating officer, or chief executive officer.

Financial or administrative aspects include functions such as that of credit manager, accounts payable/receivable manager, personnel manager, controller, chief financial officer, or similar functions.

(2) Actions That Are Not Participa- tion in Management--(i) Actions at the Inception of the Loan or Other Trans- action. No act or omission prior to the time that indicia of ownership are held primarily to protect a security interest constitutes evidence of participation in management within the meaning of section 101(20)(A). A prospective holder who undertakes or requires an environmental inspection of the vessel or facility in which indicia of ownership are to be held, or requires a prospective borrower to

clean up a vessel or facility or to comply or come into compliance (whether prior or subsequent to the time that indicia of ownership are held primarily to protect a security interest) with any applicable law or regulation, is not by such action considered to be participating in the vessel or facility's management. Neither the statute nor this regulation requires a holder to conduct or require an inspection to qualify for the exemption, and the liability of a holder cannot be based on or affected by the holder not conducting or not requiring an inspection.

(ii) Policing and Workout. Actions that are consistent with holding ownership indicia primarily to protect a security interest do not constitute participation in management for purposes of section 101(20)(A) of CERCLA. The authority for the holder to take such actions may, but need not, be contained in contractual or other documents specifying requirements for financial, environmental, and other warranties, covenants, conditions, representations or promises from the borrower. Loan policing and workout activities cover and include all activities up to foreclosure and its equivalents, as provided in 40 CFR 300.1100(d)(1).

(A) Policing the Security Interest or Loan. A holder who engages in policing activities prior to foreclosure will remain within the exemption provided that the holder does not by such actions participate in the management of the

vessel or facility as provided in 40 CFR 300.1100(c)(1). Such actions include, but are not limited to, requiring the borrower to clean up the vessel or facility during the term of the security interest; requiring the borrower to comply or come into compliance with applicable federal, state, and local environmental and other laws, rules and regulations during the term of the security interest; securing or exercising authority to monitor or inspect the vessel or facility (including on-site inspections) in which indicia of ownership are maintained, or the borrower's business or financial condition during the term of the security interest; or taking other actions to adequately police the loan or security interest (such as requiring a borrower to comply with any warranties, covenants, conditions, representations or promises from the borrower).

(B) Work Out. A holder who engages in work out activities prior to foreclosure and its equivalents will remain within the exemption provided that the holder does not by such action participate in the management of the vessel or facility as provided in 40 CFR 300.1100(c)(1). For purposes of this rule, "work out" refers to those actions by which a holder, at any time prior to foreclosure and its equivalents, seeks to prevent, cure, or mitigate a default by the borrower or obligor; or to preserve, or prevent the diminution of, the value of the security. Work out activities include, but are not limited to, restructuring or renegotiating the

terms of the security interest; requiring payment of additional rent or interest; exercising forbearance; requiring or exercising rights pursuant to an assignment of accounts or other amounts owing to an obligor; requiring or exercising rights pursuant to an escrow agreement pertaining to amounts owing to an obligor; providing specific or general financial or other advice, suggestions, counseling, or guidance; and exercising any right or remedy the holder is entitled to by law or under any warranties, covenants, conditions, representations or promises from the borrower.

(iii) Actions Taken Under CERCLA section 107(d)(1). Notwithstanding 40 CFR 300.1100(c)(1), a holder does not participate in the management of a vessel or facility by taking any response action under section 107(d)(1) of CERCLA or under the direction of an on-scene coordinator.

(d) Foreclosure on Property and Post- Foreclosure Activities.--(1) Foreclosure. Indicia of ownership that are held primarily to protect a security interest include legal or equitable title acquired through or incident to foreclosure and its equivalents. For purposes of this Subpart, the term "foreclosure and its equivalents" includes purchase at foreclosure sale; acquisition or assignment of title in lieu of foreclosure; termination of a lease or other repossession; acquisition of a right to title or possession; an agreement in satisfaction of the obligation; or any other formal or informal

manner (whether pursuant to law or under warranties, covenants, conditions, representations or promises from the borrower) by which the holder acquires title to or possession of the secured property. The indicia of ownership held after foreclosure continue to be maintained primarily as protection for a security interest provided that the holder undertakes to sell, re-lease property held pursuant to a lease financing transaction (whether by a new lease financing transaction or substitution of the lessee), or otherwise divest itself of the property in a reasonably expeditious manner, using whatever commercially reasonable means are relevant or appropriate with respect to the vessel of facility, taking all facts and circumstances into consideration, and provided that the holder did not participate in management (as defined in 40 CFR 300.1100(c)) prior to foreclosure and its equivalents. For purposes of establishing that a holder is seeking to sell, re-lease property held pursuant to a lease financing transaction (whether by a new lease financing transaction or substitution of the lessee), or divest a vessel or facility in a reasonably expeditious manner, the holder may use whatever commercially reasonable means as are relevant or appropriate with respect to the vessel or facility, or may employ the means specified in 40 CFR 300.1100(d)(2)(i). A holder that outbids, rejects or fails to act upon a written bona fide, firm offer of fair consideration for the property, as provided in 40 CFR 300.1100(d)(ii), is not considered to hold indicia

of ownership primarily to protect a security interest.

(2) Holding Foreclosed Property for Disposition and Liquidation. A holder, who did not participate in management prior to foreclosure and its equivalents, may sell, re-lease property held pursuant to a lease financing transaction (whether by a new lease financing transaction or substitution of the lessee), liquidate, maintain business activities, wind up operations, undertake any response action under section 107(d)(1) of CERCLA or under the direction of an on-scene coordinator, and take measures to preserve, protect or prepare the secured asset prior to sale or other disposition. The holder may conduct these activities without voiding the exemption, subject to the requirements of 40 CFR 300.1100(d)(1) and 300.1100(d)(2).

(i) A holder establishes that the ownership indicia maintained following foreclosure and its equivalents continue to be held primarily to protect a security interest by, within twelve months following foreclosure, listing the vessel or facility with a broker, dealer, or agent who deals with the type of property in question, or by advertising the vessel or facility as being for sale or disposition on at least a monthly basis in either a real estate publication or a trade or other publication suitable for the vessel or facility in question, or a newspaper of general circulation (defined as one with a circulation over 10,000, or one suitable

under any applicable federal, state, or local rules of court for publication required by court order or rules of civil procedure) covering the area where the property is located. For purposes of this provision, the twelve-month period begins to run from the time that the holder acquires marketable title, provided that the holder, after the expiration of any redemption or other waiting period provided by law, was acting diligently to acquire marketable title. If the holder fails to act diligently to acquire marketable title, the twelve-monthperiod begins to run on the date of foreclosure and its equivalents.

(ii) A holder that outbids, rejects, or fails to act upon an offer of fair consideration for the vessel or facility establishes that the ownership indicia in the secured property are not held primarily to protect the security interest, unless the holder is required, in order to avoid liability under federal or state law, to make a higher bid, to obtain a higher offer, or to seek or obtain an offer in a different manner.

(A) Fair consideration, in the case of a holder maintaining indicia of ownership primarily to protect a senior security interest in the vessel or facility, is the value of the security interest as defined in this section. The value of the security interest is calculated as an amount equal to or in excess of the sum of the outstanding principal (or comparable amount in the case of a lease that constitutes a security inter

est) owed to the holder immediately preceding the acquisition of full title (or possession in the case of property subject to a lease financing transaction) pursuant to foreclosure and its equivalents, plus any unpaid interest, rent or penalties (whether arising before or after foreclosure and its equivalents), plus all reasonable and necessary costs, fees, or other charges incurred by the holder incident to work out, foreclosure and its equivalents, retention, maintaining the business activities of the enterprise, preserving, protecting and preparing the vessel or facility prior to sale, re-lease of property held pursuant to a lease financing transaction (whether by a new lease financing transaction or substitution of the lessee) or other disposition, plus response costs incurred under section 107(d)(1) of CERCLA *or at* the direction of *an* on-scene coordinator; less any amounts received by the holder in connection with any partial disposition of the property, net revenues received as a result of maintaining the business activities of the enterprise, and any amounts paid by the borrower subsequent to the acquisition of full title (or possession in the case property subject to a lease financing transaction) pursuant to foreclosure and its equivalents; In the case of a holder maintaining indicia of ownership primarily to protect a junior security interest, fair consideration is the value of all outstanding higher priority security interests plus the value of the security interest held by the junior holder, each calculated as set forth in the preceding

sentence.

(B) Outbids. rejects. or fails to upon an offer of fair consideration means that the holder outbids, rejects or fails to act upon within 90 days of receipt of a written, bona fide, firm offer of fair consideration for the property received at. any time after six months following foreclosure and its equivalents. A "written, bona fide, firm offer" means a legally enforceable, commercially reason able, cash offer solely for the foreclosed vessel or facility, including all material terms of the transaction, from a ready, willing, and able purchaser who demonstrates to the holder's satisfaction the ability to perform. For purposes of this provision, the six-month period begins to run from the time that the holder acquires a marketable title, provided that the holder, after the expiration of any redemption or other waiting period provided by law, was acting diligently to acquire marketable title. If the holder fails to act diligently to acquire marketable title, the six-month period begins to run on the date of foreclosure and its equivalents.

(3) Holder's Basis of CERCLA Liabil- ity Independent of Status as Owner or Operator. (i) Provided that the holder did not participate in management prior to foreclosure and its equivalents and the holder complies with the requirements of 40 CFR 300.1100(d)(1)-(d)(2), during the period following foreclosure and its equivalents a holder in possession of a

vessel or facility can incur liability CERCLA in connection with its activities at such foreclosed vessel or facility only by arranging for disposal or treatment of a hazardous substance, as provided by CERCLA section 107(a)(3), or by **accepting** for transportation and disposing of hazardous substances at a facility selected by the holder, as provided by CERCLA section 107(a)(4).

(ii) Following foreclosure and its equivalents,. a foreclosing holder that directs or undertakes activities under CERCLA section 107(d)(1) or at the direction of an on-scene coordinator at the foreclosed vessel or facility does not incur liability for such activities.

is here also.[6]

Finally, one of the truly remarkable aspects of EPA's rule is that it purports to bind parties such as Michigan in litigation to which EPA is not even a

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[6]The Supreme Court also has refused to apply Chevron in a number of other contexts. See e.g., Ardestani v. I.N.S., ___ U.S. ___; 112 S. Ct. 515, 526 (1991) (because the Equal Access to Justice Act is not administered by a particular agency, deference is inappropriate); Litton Financial Printing Division v. NLRB, 501 U.S. 190, 201-203 (1991) (refusing to defer to NLRB in its interpretation of a contract). See also Dyk and Schenk, Exceptions to Chevron, 18 A.B.A. Sec. Admin. Law News No. 2, 1, 13 (1993) (citing United States v. Fausto, 484 U.S. 439 (1988) (whether agency decisions are judicially reviewable); Pierce v. Underwood, 487 U.S. 552 (1988) (whether an agency must pay its opponents attorneys' fees); United States v. S.A. Empresa de Viacao Aerea Rio Grandense, 467 U.S. 797 (1984) (whether agency action was within the Federal Tort Claims Act); and CIA v. Sims, 471 U.S. 159 (1985) (whether agency documents must be disclosed under the Freedom of Information Act).

party. 57 Fed. Reg. 18,368 - 18,369 (April 29, 1992). As the Court of Appeals noted, in such a circumstance "it seems somewhat strained to claim that Congress could be thought to have implicitly delegated to EPA the policy-making role that Chevron presumes...." Kelley, 25 F.3d at 1092 (emphasis in original); Pet. App. 34a. Given the lack of an implicit or explicit delegation of authority to promulgate the lender liability rule, the opinions below reaffirm the vitality of Chevron and Adams Fruit.

CONCLUSION AND RELIEF SOUGHT

The opinions of the lower court do not conflict with any decision of any other federal appeals court. Moreover, the Petition does not present an issue of vital importance in need of this Court's resolution. Indeed, EPA, a party below, has chosen not to seek a writ. Finally, the opinion below fits neatly within this Court's jurisprudence. For all the foregoing reasons, Respondents respectfully urge this Court to deny the Petition for Writ of Certiorari.

Respectfully submitted,

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Dated: November, 1994

APPENDIX

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42 U.S.C. § 9606 [CERCLA § 106]

(b)(2)(A) Any person who receives and complies with the terms of any order issued under subsection (a) of this section may, within 60 days after completion of the required action, petition the President for reimbursement from the Fund for the reasonable costs of such action, plus interest. Any interest payable under this paragraph shall accrue on the amounts expended from the date of expenditure at the same rate as specified for interest on investments of the Hazardous Substance Superfund established under subchapter A of chapter 98 of Title 26.

(B) If the President refuses to grant all or part of a petition made under this paragraph, the petitioner may

within 30 days of receipt of such refusal file an action against the President in the appropriate United States district court seeking reimbursement from the Fund.

(C) Except as provided in subparagraph (D), to obtain reimbursement, the petitioner shall establish by a preponderance of the evidence that it is not liable for response costs under section 9607(a) of this title and that costs for which it seeks reimbursement are reasonable in light of the action required by the relevant order.

(D) A petitioner who is liable for response costs under section 9607(a) of this title may also recover its reasonable costs of response to the extent that it can demonstrate, on the adminis-

trative record, that the President's decision in selecting the response action ordered was arbitrary and capricious or was otherwise not in accordance with law. Reimbursement awarded under this subparagraph shall include all reasonable response costs incurred by the petitioner pursuant to the portions of the order found to be arbitrary and capricious or otherwise not in accordance with law.

(E) Reimbursement awarded by a court under subparagraph (C) or (D) may include appropriate costs, fees, and other expenses in accordance with subsections (a) and (d) of section 2412 of Title 28.

42 U.S.C. § 9607 [CERCLA § 107]

§ 9607(a) Notwithstanding any other provision or rule of law, and subject only to the defenses set forth in subsection (b) of this section--

(1) the owner and operator of a vessel or a facility,

(2) any person who at the time of disposal of any hazardous substance owned or operated any facility at which such hazardous substances were disposed of,

(3) any person who by contract, agreement, or otherwise arranged for disposal or treatment, or arranged with a transporter for transport for disposal or treatment, of hazardous substances owned or possessed by such person, by

any other party or entity, at any facility or incineration vessel owned or operated by another party or entity and containing such hazardous substances, and

(4) any person who accepts or accepted any hazardous substances for transport to disposal or treatment facilities, incineration vessels or sites selected by such person, from which there is a release, or a threatened release which causes the incurrence of response costs, of a hazardous substance, shall be liable for--

(A) all costs of removal or remedial action incurred by the United States Government or a State or an Indian tribe not inconsistent with the national contingency plan;

(B) any other necessary costs of response incurred by any other person consistent with the national contingency plan;

. . . .

42 U.S.C. § 9613 [CERCLA § 113]

(b) Jurisdiction; venue

Except as provided in subsections (a) and (h) of this section, the United States district courts shall have exclusive original jurisdiction over all controversies arising under this chapter, without regard to the citizenship of the parties or the amount in controversy. Venue shall lie in any district in which the release or damages occurred, or in which the defendant resides, may be found, or has his principal office. For the purposes of this section, the Fund shall reside in the District of Columbia.

* * *

(j)(2) Standard

In considering objections raised in any judicial action under this chapter, the court shall uphold the President's decision in selecting the responsible action unless the objecting party can demonstrate, on the administrative record, that the decision was arbitrary and capricious or otherwise not in accordance with law.